RECORD AND BRIEFS

Nos. 16-74, 16-86, 16-258

In The
Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, et al.,

Petitioners,

v.

MARIA STAPLETON, et al.,

Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, et al.,

Petitioners,

v.

LAURENCE KAPLAN,

Respondent.

DIGNITY HEALTH, et al.,

Petitioners,

v.

STARLA ROLLINS,

Respondent.

On Writs Of Certiorari To The Third, Seventh, And Ninth Circuit Courts Of Appeals

BRIEF OF *AMICUS CURIAE* SAINT ELIZABETH MEDICAL CENTER, INC. IN SUPPORT OF PETITIONERS

RICHARD G. MEYER
Counsel of Record
MARK D. GUILFOYLE
MARK R. HERVEY
DRESSMAN BENZINGER LAVELLE psc
207 Thomas More Parkway
Crestview Hills, Kentucky 41017
(859) 341-1881
rmeyer@dbllaw.com

Counsel for Amicus Curiae
St. Elizabeth Medical Center, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

St. Elizabeth Medical Center, Inc. (St. Elizabeth) is a non-profit charitable organization located in the Commonwealth of Kentucky. It operates a stand-alone hospital and is recognized by the Roman Catholic Church in its *Official Catholic Directory* as a "public juridic person" that provides healthcare services in the name of the Catholic Church. Its retirement benefits plan, funded solely by employer contributions, originated in 1966.

A Catholic order of professed sisters, emigrating from Aachen, Germany, founded St. Elizabeth in 1861 to serve the predominantly German immigrant population that had settled along the Ohio River in Northern Kentucky and Cincinnati, Ohio. Seven years later, this religious order, known as the Franciscan Sisters of the Poor ("Franciscan Sisters"), formed a civil corporation in the name of the Order to acquire additional properties for their expanding hospital and assume related indebtedness. Ever since, their hospital has grown apace, such that St. Elizabeth now consists of six separate hospital campuses located throughout Northern Kentucky, as well as a hospice center serving

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[1] Letters granting blanket consent from all parties are on file with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

patients out of each location. G. Colvin Decl., Appendix A, pp. 3-4, ¶¶ 8-16.

St. Elizabeth still functions as a Catholic Church institution, but since 1973 under the sponsorship of the Bishop of the Diocese of Covington rather than the Franciscan Sisters. *Id.* at pp. 5-11, ¶¶ 17-26. And to this day it offers pension plan benefits to its employees in the defined-benefits plan adopted by the Franciscan Sisters for their St. Elizabeth employees over fifty years ago. In 1983 and again in 1991, the Internal Revenue Service (IRS) reviewed information concerning all relevant aspects of the plan, determining that it qualified for church plan status under the IRC definition and, by implication, under 29 U.S.C. § 1002(33). *Id.* at p. 11, ¶¶ 26-29.

St. Elizabeth has the same concerns as other church-affiliated charitable institutions arising from recent federal appellate court decisions involving the ERISA definition of an exempt church plan. In common with most if not all of them, St. Elizabeth relied on guidance provided by the Internal Revenue Service advising of the requirements to comply with the ERISA church plan exemption. St. Elizabeth is currently defending claims raising many of the same legal issues present in this appeal, in a case styled *Delores Boden v. St. Elizabeth Medical Center, Inc.*, United States District Court, Eastern District of Kentucky, Civil Action No. 2:16-cv-00049. *Boden* Compl., Appendix B, pp. 17-50. Defendants' motion to dismiss is pending before Hon. David Bunning in that case. Resolution of the issues herein could determine the outcome of that

pending motion. At a minimum, it will clarify the ERISA and First Amendment issues which Judge Bunning is being asked by the parties to determine.

The questions presented herein are therefore of great importance to St. Elizabeth, as with other religiously-affiliated healthcare institutions across the country. Since the Franciscan Sisters originated the plan in the mid-1960s, St. Elizabeth has been providing pension benefits, fully in accord with the plan's provisions, to all of its qualified employees. G. Colvin Decl., Appendix A, pp. 11-16. In fact, two of the three named plaintiffs in the *Boden* lawsuit have been participants in the St. Elizabeth plan almost from its inception. While operating under the auspices of the Diocese of Covington, St. Elizabeth has continued to pay all benefits required by the plan's provisions and has continued to make substantial monetary contributions to the plan, in accordance with its obligations as a Catholic healthcare employer and in accordance with its common law duties. *Id.*

Respondents in this consolidated appeal and their *amici* have sharply asserted that the ERISA church plan exemption cannot possibly be applicable to large healthcare institutions, no matter how closely affiliated with the religious beliefs, practices and mission of an established church. Secular by nature, according to this line of argument, the provision of healthcare services prevents even a benefits plan originating with a Catholic Church religious order such as the Franciscan Sisters from qualifying as an ERISA exempt church plan. However, the First Amendment and the church

plan exemption as crafted by Congress in 1980 will not brook such a stark and artificial dichotomy between a church's religious imperative to provide healthcare to the sick and dying and the selfsame mission of the church's "good works" emissaries.

St. Elizabeth submits this *amicus curiae* brief in support of Petitioners' compelling construction of the ERISA provisions at issue and to furnish the Court with a concrete perspective on how Respondents' coordinated attacks on healthcare ministries of Catholic and other religious institutions are constitutionally suspect, as well as at odds with the exemption as enacted by Congress.

BACKGROUND

A. The *Boden v. St. Elizabeth* Lawsuit

On March 17, 2016, three participants in the St. Elizabeth defined-benefits plan filed a declaratory judgment action on behalf of themselves and all plan participants seeking a judicial determination that the plan does not satisfy the elements of an ERISA exempt church plan. *Boden* Compl., Appendix B, pp. 17-50. One of the named plaintiffs first became a St. Elizabeth plan participant in 1968, another in 1973, and the third in 1980. *Id.* at pp. 20-21, ¶¶ 11-13. Two of the three have been receiving their plan benefits for many years. G. Colvin Decl., Appendix A, pp. 11-12, ¶ 30.

Although the Complaint does acknowledge that the Franciscan Sisters founded the original St. Elizabeth hospital in 1861 and originated the St. Elizabeth pension plan a century later, plaintiffs deny that the plan was established by a church, asserting that it was established by a "large health care conglomerate." *Bodin* Compl., Appendix B, pp. 19, 36, ¶¶ 5, 71. Moreover, even though acknowledging that the Franciscan Sisters transferred sponsorship of St. Elizabeth to the Diocese of Covington in 1973, plaintiffs nevertheless aver that the plan has not been maintained by a church-affiliated organization. *Id.* at pp. 19, 36, ¶¶ 5, 72. And they deny that St. Elizabeth's employees are deemed to be church employees under ERISA's 1980 definition of a church employee. *Id.* at p. 37, ¶ 75. Similarly, plaintiffs deny that St. Elizabeth is deemed to be a church employer under the 1980 version of ERISA. *Id.* at pp. 19, 25-27, 36, ¶¶ 5, 27-30, 69. Each of these issues is central to the matter before this Court.

The gravamen of the *Boden* Complaint is that the St. Elizabeth plan is not a church plan because St. Elizabeth is one of the "largest hospitals in Greater Cincinnati," *id.* at ¶ 25, it has a predominant healthcare mission, *id.* at ¶ 27, its corporate officers are lay persons, *id.* at ¶ 35, it is a business and not a church, *id.* at ¶ 40, and it allegedly is not required "to follow any religious beliefs, practices, rules, restrictions, directions or guidelines," *id.* at ¶ 43. In sum, the *Boden* plaintiffs are advocating the same narrow interpretation of 29 U.S.C. § 1002(33) recently adopted by several federal Courts of Appeals.

In addition to a declaratory judgment, plaintiffs in the *Boden* lawsuit are seeking the assessment of millions of dollars in statutory penalties, at the rate of $110.00 per day per plan participant, due to St. Elizabeth's failure to provide the notices required of non-exempt ERISA plan sponsors. *Id.* at p. 42, ¶ 101. Based on their narrow interpretation of an exempt church plan, plaintiffs also request the appointment of an independent fiduciary to operate the plan in compliance with all ERISA requirements. *Id.* at p. 39, ¶ 85

B. First Amendment Implications

For the reasons discussed hereinafter, the restrictive interpretation of an ERISA church plan, as articulated by the Third, Seventh and Ninth Circuit Courts of Appeals, with the attendant monetary and other consequences for a church-affiliated entity whose plan does not fit within these confines, is vulnerable to serious constitutional challenges. If this constricted approach stands, the District Court in the *Boden* case will have to interpret Roman Catholic canon law to determine the ecclesiastical status of the Franciscan Sisters as of the mid-1960s when they established the St. Elizabeth plan. Indeed, in responding to St. Elizabeth's motion to dismiss, plaintiffs have taken the position that, for purposes of the threshold "established and maintained by a church" mandate of 29 U.S.C. § 1002(A), a Catholic order of religious women is not on a par with a Catholic diocese such as the Diocese of Covington, Kentucky. The latter may be a church,

plaintiffs argue as a matter of theology, but not an order of religious women invested and commissioned by the Roman Pontiff to carry on their charism of caring for the sick and dying in the name of the Catholic Church.

The District Court would also have to inquire into the "religiosity" of the members of the St. Elizabeth pension committee which administers the plan since the narrow church plan definition promoted by plaintiffs hinges in part on limiting the expansive reach of 29 U.S.C. § 1002(C)(i) to religiously-affiliated but independent pension boards. *See Rollins v. Dignity Health*, 830 F.3d 900, 907 (9th Cir. 2016) (construing the 1980 amendment to be limited to "pension boards"). The District Court will then have to determine whether a narrow church plan definition, as advanced by the *Boden* plaintiffs as well as Respondents and their *amici*, discriminates against churches which choose to further their healthcare missions through separate corporations and their internal pension committees.

C. Reliance on IRS Guidance

Of significance herein, the *Boden* Complaint does not mention that on two occasions, first in 1983 and then in 1991, the Internal Revenue Service investigated all relevant aspects of the St. Elizabeth plan and, consistent with its 1982 General Counsel Memorandum (GCM), 1983 WL 197946, determined that the plan qualified as a church plan that is exempt from the ERISA funding and notice requirements on which the

Boden plaintiffs base their claims against St. Elizabeth.

In its 1982 GCM, the IRS focused on a literal reading of the ERISA definitions of a "deemed church employee" and church-associated organization in the tax analog to the ERISA definition of a church plan. Thus in 1980, Congress amended both ERISA and the Code, using the exact same definitional church plan verbiage in ERISA § 1002(33), 29 U.S.C. § 1002(33), and in IRC § 414(e), 26 U.S.C. § 414(e). At that time, Congress created out of whole cloth the "deemed church employee" and "deemed church employer" elements of the church plan definition. There were no such concepts in the original 1974 version of ERISA.

As required by a literal reading of these two new concepts, both directly related to tax-exempt organizations that share "common religious bonds and convictions with" a church, the IRS did an about-face from the position it had taken in its 1977 General Counsel Memorandum. *See* IRS Gen. Couns. Mem. 37,266, 1977 WL 46200 (Sept. 22, 1977) (discussing the essential elements of a church plan under the original 1974 version). Relying on a proposed unrelated business income tax regulation, the IRS had opined in 1977 that pension plans initiated by female religious orders (who do not perform priestly functions) do not qualify as exempt church plans. *Id.* at *6. But in 1982, the IRS realized that the church plan definition was substantially expanded by inclusion of the deemed employer/employee provisions of 26 U.S.C. § 414(e)(3)(B) and (C), as well as the "principal-purpose" organization

language of § 414(e)(3)(A), *i.e.*, ERISA § 1002(33)(C)(i), (ii) and (iii). 1982 GCM, 1983 WL 197946, at *4-6. Like many courts thereafter, the IRS concluded that the 1980 amendments permitted church-associated entities to establish and maintain exempt church plans.

D. History of Amendments

The legislative history is clear that the purpose of the 1980 amendments was to conform the church plan definition to the variety of ways in which plans historically were organized to include employees of church agencies. 125 Cong. Rec. 10,051-10,058 (1979). The purpose was not to require plans to conform to a narrow church plan definition. As the co-sponsor, Senator Talmadge stated: "[T]he church plan definition is so narrow (in the 1974 version) that it almost completely fails to consider the way our church plans have for decades operated." *Id.* at 10,052. The definition was expanded "to accommodate the differences in beliefs, structures, and practices among our religious denominations." *Id.*

Senator Talmadge supported the proposed changes by introducing into the record letters from various church representatives. 125 Cong. Rec. 10,054 (1979). A prevalent theme of the letters was dismay and concern about the IRS' 1977 GCM usurping the churches' role in deciding which of their organizations met the definition of a church. *See*, for example, the letter from the Rabbinical Pension Board stating: "We are particularly concerned about the intrusion of the Internal

Revenue Service into the affairs of church groups and their agencies by presuming to define what is and what is not an integral part of these religious groups." *See also* the letters from The American Lutheran Church, the Reorganized Church of Jesus Christ of Latter Day Saints, the Annuity Board of Southern Baptist Convention, the Christian Reformed Church in N.A. Ministers' Pension Fund, The Church Pension Fund, and the General Conference of Seventh Day Adventists. *Id.* at 10,054-58.

As subsequently recognized by the IRS, the 1980 legislation dispelled such concerns by allowing both churches and church-affiliated organizations to establish and maintain church plans. In determining exempt church plan status, the IRS concluded, it was no longer necessary to distinguish a church from its affiliates. In this regard, a co-sponsor of the legislation, Senator Jacob Javits, concluded that the amendments went too far by equating church-affiliated organizations with churches. 126 Cong. Rec. 20,180 (1980). But Senator Javits concluded that this compromise was the price of passage. Drawing on this legislative history, the IRS quoted Senator Javits' comment in its 1982 GCM to the effect that the 1980 amendments exempt "those who work for schools and similar institutions." IRS GCM, 1983 WL 197946, at *4-6.

Moreover, until just recently, this was the judicially accepted reading of the 1980 church plan definition.

SUMMARY OF ARGUMENT

Religiously-affiliated entities, including *amicus* St. Elizabeth, have for decades reasonably relied on guidance by the IRS in operating their retirement plans. Recent court opinions have been, quite unfairly, critical of the IRS position for allegedly ignoring statutory language and legislative history. In its 1982 GCM, the IRS did neither. Moreover, an analysis of judicial opinions beginning in 1997 demonstrates that the IRS has adopted a middle position between two extremes that is a holistic interpretation of the 1980 amendments, relating each section to the whole, and is consistent with the legislative intent "to accommodate the differences in beliefs, structures, and practices among our religious denominations." 125 Cong. Rec. 10,052 (Senator Talmadge).

This approach is absolutely necessary to avoid emasculating the "corrective" provisions of the 1980 amendments, ERISA § 1002(33)(D), especially for plans predating the initial adoption of ERISA, and to avoid an unconstitutional probing by civil courts of what religious missions, often performed by separate civil corporations, constitute or do not constitute the "church." For St. Elizabeth, the unconstitutional probing involves the theological issue of whether the Franciscan Sisters constituted the Catholic Church in the mid-1960s. Just as Senator Talmadge cautioned against going to war with a host of religions by adhering to the original narrow church plan definition, it is urged herein that this Court, also to avoid religious

confrontations out of keeping with First Amendment protections, eschew the narrow church plan definition advocated by Respondents and their *amici*. The narrow interpretation forces religious entities to conform to artificial strictures, just the opposite of the Congressional intent in 1980 to relax church plan requirements in order to reflect historical and diverse modes by which churches and their agencies pursued their missions.

ARGUMENT

A. For Decades Church-Affiliated Non-Profits Operated Their Pension Plans in Reliance on the IRS' Thorough Analysis of the 1980 Amended Church Plan Definition.

Of decisive import herein, when Congress in 1980 substantially re-wrote paragraph (33) of ERISA § 1002, there is no dispute that Congress expanded the church-plan definition in response to a wide outpouring of concerns from many religious quarters, including a concern that the agency interpretation of "church" was limited to "houses of worship," thus excluding plans of separately incorporated "good works" ministries.

Enacted as Section 407 of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, § 407 (1980), the revised definition of an exempt plan drastically altered agency reviews of exemption requests. The amendments were codified at

both 29 U.S.C. § 1002(33), which is enforced by the Department of Labor (DOL), and 26 U.S.C. § 414(e), which falls within the jurisdiction of the IRS. *See History of EBSA and ERISA*, United States Department of Labor, http://www.dol.gov./ebsa/aboutebsa/history.html (last visited Jan. 19, 2017). "The definition of 'church plan' contained in ERISA § 1002(33) is identical to the definition set forth in § 414(e) of the Internal Revenue Code." *Humphrey v. Sisters of St. Francis Health Services, Inc.*, 979 F. Supp. 781, 786 (N.D. Ind. 1997) (deciding the mixed legal and factual church plan dispute in conformity with IRS findings).[2]

1. Traditional Expansive Reading of Definition

Despite claims to the contrary, decades of consistent agency interpretations of the amended church plan definition are compatible with a plain reading of the statute. Although subparagraph (33)(A) sets out a baseline requirement that church plans must be established and maintained by a church, it does not define "established" or "church." Neither does any other ERISA provision. Next, subparagraph (33)(B) eliminates certain church plans from the exemption where

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[2] Petitioners have fully documented the longstanding interpretation of the 1980 church plan definition by the Department of Labor, as well as by the Pension Benefit Guarantee Corporation established within the DOL by 29 U.S.C. § 1302. Pet. Br., p. 9. Suffice to say that these interpretations, like that of the IRS, avoid the First Amendment infringements which are the main concern of this Amicus Brief.

a substantial number of employees are engaged in activities unrelated to church activities. Subparagraph (33)(C) introduces several entirely new concepts into the definition. Subparagraph (33)(D), which also makes reference to "established and maintained," allows retroactive corrections to bring a plan into compliance with the exemption requirements.

There is no dispute that Congress intended, via subparagraph (33)(C) and its four subparagraphs, to build upon § 1002(33)(A) such that exempted plans would not be limited to plans established and maintained by a church (or association or convention of churches). The debate is over the extent to which Congress, by introducing a number of novel concepts into subparagraph (33)(C), intended to expand beyond the minimal definition in subparagraph (33)(A). It should be noted in this regard that subparagraph (33)(C) is ***expressly made applicable*** to the entirety of paragraph (33), whereas subsection (C)(i) is not made "subject to" subparagraph (A).

The broad interpretation, accepted universally until just recently, is that clauses (C)(i) through (C)(iv) were intended by Congress to allow church agencies to establish and maintain exempt plans, with the caveat that the term "agencies" from the 1974 version was discarded for the more concrete description in (C)(iv) of an entity "sharing common religious bonds and convictions with that church." Representative cases adopting the broad construction include *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001) ("[A] plan established by a corporation associated with a church can still

qualify as a church plan."); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Me. 2004) ("Thus, ERISA brings a plan established or maintained by a non-church organization within the general definition of a 'church plan' if that organization is 'controlled by' or 'associated with' a church."); *Rinehart v. Life Insurance Company of North America*, 2009 WL 995715, at *4 (W.D. Wash. Apr. 14, 2009) ("The term church plan is somewhat misleading because even a plan established by a corporation controlled by or associated with a church can also qualify as a church plan."); *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1126 (D. Minn. 2011) ("The Court has thoroughly reviewed the applicable law and the arguments of counsel, and finds no support for Plaintiffs' position that a single employer benefit plan, established and maintained by an organization controlled by or associated with a church, is not a church plan as defined by ERISA."); and *Overall v. Ascension*, 23 F. Supp. 3d 816, 829 (E.D. Mich. 2014) ("Thus, as amended in 1980, the church plan exemption includes plans sponsored by church-affiliated organizations, such as hospitals and schools . . . "). There is no reason to believe that these courts, and a half dozen others, as well as two federal agencies, were incapable of a plain reading of the statute.

This broad interpretation has been unfairly criticized as an abandonment of subparagraph (33)(A):

> This broad interpretation does not 'eviscerate' subsection (A) or create an 'exception' that

> swallows the rule. Subsections (A) and (C)(i) are simply different ways a plan can qualify for church-plan status. A plan can still be a church plan if it is established and maintained by a church under subsection (A). The broad interpretation does not change this. Consequently, subsection (A) still has meaning. However, a church plan need not be established by a church if it is properly maintained under subsection (C)(i) by a church-affiliated organization for the benefit of church employees. That does not 'swallow the rule' in subsection (A); it is a rational *extension* of the rule in subsection (A) for the purpose of protecting all 'church employees,' broadly defined by the statute to include the employees of non-profit religious organizations.

Jeffrey A. Herman, *Resolving ERISA's "Church Plan" Problem*, 31 ABA J. Lab. & Emp. L. 231, 242 (Winter 2016). Thus subparagraph (33)(A) continues the exemption for plans established by "churches," as narrowly defined by the IRS, whereas (33)(C) allows for the establishment and maintenance of exempt plans by church-affiliated entities defined as "sharing common religious bonds and convictions with that church."

2. Differences Over "Principal Purpose" Language

Adopting a broad interpretation of subparagraph (33)(C), at odds with the IRS interpretation in one respect, a number of courts have concluded that clause (33)(C)(i) was intended to provide just one example,

among others, of how a "principal-purpose" entity could establish and maintain an exempt church plan. However, there is no requirement according to this view that a plan established by a church-affiliated entity had to be maintained by a religiously-affiliated organization.

The IRS interpretation disagrees with these cases, which include: *Welsh v. Ascension Health*, 2009 WL 1444431, at *6 (N.D. Fla. May 21, 2009) (holding that subparagraph (C)(i) merely provides an "additional means" of complying with the "established and maintained by" requirement); *Rinehart v. Life Insurance Company of North America*, 2009 WL 995715, at *3 (W.D. Wash. Apr. 14, 2009) (holding that subparagraph (C)(i) is "non-limiting" and applicable only where the plan is administered by a third-party); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 86, n.4 (D. Me. 2004) (holding that subparagraph (C)(i) merely provides an "alternative means" of complying with the "established and maintained" requirement); and *Friend v. Ancilla Systems, Inc.*, 68 F. Supp. 2d 969, 973 (N.D. Ill. 1999) (holding that the "principal purpose" appears in subparagraph (C)(i) merely to provide an example of how a plan may attain church plan status). By this case law, the intent of (C)(i) is to define "established and maintained," not to insist on any particular type of plan administrator. Establish and maintain "includes" administration by a religiously-affiliated "principal purpose" organization, but is not limited to this plan maintenance format.

At the opposite end of the spectrum, the narrow view is that the 1980 expansion did no more than create a single exception to (33)(A), namely for plans established by a church and maintained by an independent, but religiously-affiliated board (a church pension board) whose principal purpose is to administer or fund a pension plan. *Rollins*, 830 F.3d at 907 ("The legislative history is clear that subparagraph (C)(i) addressed only the problem of maintenance by church-controlled or church-affiliated pension boards.") The use of "includes" in subsection (C)(i) is not expansive, according to this narrow interpretation, but instead has a single-minded purpose.[3]

Adherents of both views appeal to the plain and unambiguous wording of paragraph (33). *E.g.*, *Medina v. Catholic Health Initiatives*, 2014 WL 4244012 at *2 (D. Colo. Aug. 26, 2014). ("[T]he plain language clearly supports the conclusion that a plan meeting the requirements of subparagraph (C)(i) putatively qualifies for the exemption – without further proof of establishment by a church – if the remaining requirements of the statute are otherwise met."); and, reaching the opposite conclusion, *Stapleton v. Advocate Healthcare Network*, 817 F.3d 517, 526 (7th Cir. 2016) ("Loyalty to the plain language principle is particularly important in this case.").

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[3] Petitioners astutely point out that the reference to pension boards in the MPPAA legislative history actually clarifies Congress' intent in enacting subsection (C)(i) to permit pension boards to *establish* and maintain church plans in conformity with longstanding practice. Pet. Br., pp. 18, 36.

3. IRS' Middle-Ground Position

As *amicus curiae*, St. Elizabeth suggests that the IRS got it exactly right in construing the church plan exemption when it adopted a middle position in its 1982 GCM, 1983 WL 197946. The IRS' statutory analysis began with the threshold definition of a church plan "as a plan established and maintained for its employees (or their beneficiaries) by a church." *Id.* at *2. Referring to clauses (C)(ii) and (C)(iv), it then noted that "the term employee of a church shall include" employees of a tax-exempt organization which "shares common religious bonds and convictions with" a church. *Id.* at *3. The GCM then referenced the "principal purpose" clause, drawing the conclusion that a qualified church plan must meet either the requirements of § 414(e)(1) or the requirements of § 414(e)(3)(A), *i.e.*, § 1002(33)(A) or (33)(C)(i). If the latter, then a principal-purpose organization must fund or administer the plan. Critics have accused the IRS of ignoring the fundamental "established and maintained" requirement, but obviously it did not, making references to it throughout its analysis.

After reiterating the position it expressed in its 1977 GCM, 1977 WL 46200, namely that most religious orders, since they do not engage in sacerdotal functions or conduct worship activities, do not qualify as churches exempt from the unrelated business income tax imposed by 26 U.S.C. § 511, the 1982 GCM concluded that the MPPAA made this a moot point:

> Since religious orders can now have their employees covered by a church plan without a determination that such orders are churches, this nonchurch status is not fatal.

1983 WL 197946, at *4. Under the amended scheme, to attain exempt status for their plans, religious orders have a twofold burden: prove that their employees are deemed employees of a church and that the plans are funded or administered as provided for in the statute. *Id.* An appropriate administrator may include a committee "appointed by the order." *Id.* at *5. For "houses of worship," the GCM clearly recognized that an alternate route remained available for establishing and maintaining an exempt church plan under § 414(e)(1). *Id.* at *3. Under the ERISA provisions, these alternative routes are set out in subparagraphs (33)(A) and (33)(C)(i).

The 1982 GCM merely expressed the obvious conclusion that to have a qualified church plan, church-affiliated entities "must establish that their employees are deemed employees of the Catholic Church through Section 414(e)(3)(C) by virtue of the [entity's] affiliation with the church." *Id.* at *4. Though not explicitly stated in the Memorandum, the identification of the church as the deemed employer of the church-affiliated organization's employees fuses together the church and the church-affiliated entity. This statutory equivalence of church and church-affiliated employer made it unnecessary for the IRS to decipher why Congress used the single word "maintained" to expand on "established and maintained" in clause (C)(i).

Nor have the Third, Seventh and Ninth Circuit Courts of Appeals explained why, except to rely on a totally inapposite hypothetical statute involving disabled veterans. *See, e.g.*, *Rollins*, 830 F.3d at 906; *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175, 181 (3d Cir. 2015). The hypothetical is inapposite because not all veterans are disabled, but all pension plans, including church plans, are established and maintained. A plan which has been established, but never maintained, is not a plan that could qualify for exempt status. For a more finely tuned hypothetical, appropriate to actually establishing and maintaining a benefits plan, *see* 31 ABA J. Lab & Emp. L. at 255-56.

The church being the deemed employer of a church-affiliated organization's employees, by the IRS' analysis there was no inconsistency between (A) and (C)(i) in light of the IRS' conclusion that administration by a "principal purpose" organization, whether a civil law corporation or otherwise, was an essential requirement. The IRS thus read the paragraph (33) church plan definition as a whole, not piecemeal. This is the holistic approach to statutory interpretation that this Court has insisted upon:

> In so concluding we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning

> of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . .

King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) (citations and internal quotation marks omitted). *See also United States v. Atlantic Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must be read as a whole.").

It is this middle position, as well as the IRS' interpretation permitting non-church organizations to establish and maintain qualified church plans, that nonprofit religious entities, including religiously-based hospitals throughout the country, have relied upon for over three decades in operating their pension plans. For this reason, St. Elizabeth has for years used a religiously-affiliated Administrative Committee to maintain its plan. To conform to the IRS' interpretation of ERISA § 1002(33)(C)(i), St. Elizabeth issued a corporate resolution requiring that at least half of the Committee members must "believe in and follow the tenets of the Catholic Church." G. Colvin Decl., Appendix A, pp. 12-16, ¶¶ 33-34, 39-40. So long as judicial review of St. Elizabeth's compliance with this corporate resolution is properly limited (*infra*, pp. 28-29), the IRS' insistence on a church-controlled or church-associated administrative committee does not pose any First Amendment concerns.

B. Contrary to Congress' Intent, the Narrow Church Plan Definition Poses Potentially Dire Consequences for Plans Predating ERISA.

Despite St. Elizabeth's efforts to comply with the IRS requirements for an exempt church plan, including reliance on a church-associated Administrative Committee, the narrow construction espoused by Respondents and their *amici* has potentially ominous consequences for St. Elizabeth and other church-affiliated institutions which have benefits plans predating ERISA. These potential consequences are not only monetary. The narrow construction also deprives these church-affiliated entities of their statutory right to correct deficiencies related to church-plan requirements. In this regard, when Congress revised § 1002(33) in 1980, it added subparagraph (33)(D) to allow plan sponsors to correct deficiencies that prevented church plan qualification:

> If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26 ***fails to meet one or more of the requirements of this paragraph*** and corrects that they are to meet such requirements within the correction period the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

29 U.S.C. § 1002(33)(D)(i) (emphasis added).

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29 U.S.C. § 1002(33)(D)(i) (emphasis added).

In construing this "corrective" provision, a question arises as to what are the "one or more of the requirements of this paragraph." If one of the requirements is that the plan be directly established by a church, an essential requirement according to Respondents and their *amici*, this would present a dilemma for St. Elizabeth and other institutions maintaining pre-ERISA plans. As noted, the Franciscan Sisters established the St. Elizabeth plan nearly a decade prior to the enactment of ERISA. If the Franciscan Sisters were not an integral part of the Catholic Church hierarchy, as the *Boden* plaintiffs contend, the plan remained exempted only through the sunset date (December 31, 1982) of the original ERISA § 1002(C), relating to church agencies.

As a consequence, under the narrow church plan definition, and assuming contrary to Roman Catholic canon law that the Order of Franciscan Sisters is merely a church agency and not equivalent to the church itself, then the St. Elizabeth plan no longer qualified as an exempt church plan as of January 1, 1983. Arguably, this purported "deficiency" could have been corrected in accordance with § 1002(33)(D) if the existing plan had been terminated and a new plan had been "established by a church" under ERISA § 1002(33)(A). In addition to the practical problems associated with terminating an existing plan and establishing a new one, in these circumstances Respondents' narrow interpretation does not even permit the invocation of the subparagraph (33)(D) remediation protocol:

> As with its analysis of sections A and C, the Court's analysis of section D of the statute must begin with the language of the statute. The language of section D begins exactly as section A begins: "If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches. . . ." 29 U.S.C. § 1002 (33)(D)(i). The Court has already found identical language to refer only to a benefits plan established by a church and has concluded that the CHI Plan is not such a plan. *See* Section III.D., *supra*. The Court will not read identical language to read one thing in one section and another thing in a different section of the same statute.
>
> * * *
>
> Accordingly, the Court concludes that, based on a plain reading of the unambiguous language of the statute, section (D) only allows a correction period for a benefits plan established by a church.

Medina v. Catholic Health Initiatives, 2014 WL 3408690, at *12 (D. Colo. July 9, 2014) (Report and Recommendation of Magistrate, *rejected by District Court*, 2014 WL 4244012 (D. Colo. Aug. 26, 2014)). Surely, Congress did not intend such an absurd result. Yet this is the inevitable result demanded by the constricted mandatory church establishment interpretation adopted by the Third, Seventh and Ninth Circuit Courts of Appeals.

The holistic approach taken by the IRS, reading each part of paragraph (33) in relation to the paragraph as a whole, avoids this senseless construction of subparagraph (33)(D). It recognizes that "established and maintained" is not limited to "churches" by subparagraph (33)(A) or (33)(D). This agency interpretation therefore exhibits a power to persuade, meriting *Skidmore* deference at a minimum. *See Gonzales v. Oregon*, 546 U.S. 243, 268-69 (2006) (holding that *Skidmore* deference would be applicable to an Attorney General statutory interpretation); *AmBase Corp. v. United States*, 731 F.3d 109, 121, n. 12 (2d Cir. 2013) (explaining that an IRS General Counsel Memorandum merits *Skidmore* deference); and *Worldwide Equipment, Inc. v. United States*, 605 F.3d 319, 324, n. 3 (6th Cir. 2010) ("IRS General counsel memoranda are entitled to some deference, although they do not have the force of law because they have not been subject to notice and comment.").

Any objection that an IRS interpretation is irrelevant to a non-tax ERISA case stumbles upon the bedrock issue of Congressional intent. Congress enacted one statute, the MPPAA, giving rise to two identical church plan definitions. Granted, Congress added a number of headings to the tax version, but that only adds to the persuasive luster of the IRS' statutory construction.

Indeed, 26 U.S.C. § 414(e)(3)(A), the Code analog to ERISA § 1002(33)(C)(i), was provided by Congress with the heading, "Treatment as church plan." This is compelling evidence that Congress intended that plans

not meeting the definition in the preceding clause (e)(1) are nevertheless to be treated as church plans under (e)(3)(A). *See* J.A. Harris, 31 ABA J. Lab. & Emp. L., at 244-48. It is noteworthy that Congress did not frame the heading in terms of "Maintenance of church plan." *Id.* at 248. This Court has on more than one occasion acknowledged the significance of statutory headings:

> We also note that the title of a statute and the heading of a statute are tools available for the resolution of a doubt about the meaning of a statute.

Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998). That this is an established rule is evident from *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959) (holding that statutory headings may give an insight into the meaning of a statute.). In an ERISA case, this Court observed: "Any possible ambiguity is resolved against respondents by the title of [ERISA] § 4044(a) – 'allocation of assets.'" *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989).

C. The Mandatory Church Establishment Interpretation Raises Serious Constitutional Doubts That May Be Circumvented By A Broader Construction of the Church Plan Exemption.

Congress did not intend to limit the church plan exemption to plans directly established by "houses of

worship."[4] As mentioned, this is blatantly evident in the "corrective" provision of the church plan definition, ERISA § 1002(33)(D), which, according to the interpretation advanced by Respondents and their *amici*, would not even be available to pre-ERISA plans like St. Elizabeth's, a result that cannot reasonably be ascribed to Congress. Instead, according to Senator Talmadge, the intent of the 1980 amendments was "to accommodate the differences in beliefs, structures, and practices among our religious denominations." 125 Cong. Rec. 10,052 (1979).

1. First Amendment Ban on Intrusive Inquiries

As a result of this accommodation, through its enactment of the "controlled by or associated with" provisions of § 1002(33)(C), Congress avoided the constitutional pitfalls of attempting to precisely demarcate a boundary between a "house of worship" and its "good works" affiliates. Although this Court has never sanctioned the endeavor, it is one thing to define a purported stand-alone church. *E.g.*, *Foundation for Human Understanding v. United States*, 614 F.3d 1383 (Fed. Cir. 2010). But it is an altogether different matter for the government to grant a statutory exemption whereby courts would be required, following an evidentiary

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[4] Petitioners have reviewed in detail the legislative history which makes abundantly clear Congress' determination to make the church plan exemption available to all religiously-affiliated entities irrespective of the organizational makeup of the sponsoring church and its mission tentacles. Pet. Br., pp. 35-37.

hearing, to exclude a particular church mission from the exemption:

> It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979) (prohibiting inquiry "into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission"). As follow-on case law has made clear, *Catholic Bishop* does not ban all inquiry, but permits examination of objective facts, such as mission statements and articles of incorporation for example, indicative of religious affiliation. *E.g.*, *Carroll College, Inc. v. N.L.R.B.*, 558 F.3d 568, 572-74 (D.C. Cir. 2009). However, this Court's prohibition on intrusive inquiries into religious beliefs underlay its decision in *Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (noting a legitimate concern that civil courts may not appreciate an organization's "religious tenets and sense of mission"). *See University of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) (relying on *Amos* to distinguish between a permissible inquiry into objective facts and an impermissible inquiry into religious beliefs). Similarly, as this Court has recently observed, judicial inquiry into whether religious beliefs are honestly held may not intrude into the validity of those beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2757 (2014).

2. Conclusiveness of Church's Determination

Such an impermissible inquiry is especially inimical to religious liberty when the church itself has by its internal procedures resolved the issue, in the instance of the Franciscan Sisters whether or not an organization performing a vital church mission is an integral part of the church hierarchy. This Court has recognized the fundamental right of churches in such circumstances to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), construing *Watson v. Jones*, 13 Wall. 679, 20 L.Ed. 666 (1871). This principle was reiterated in *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 720 (1976), where this Court held that civil courts are "required to accept [the disputed] consequence as the incidental effect of an ecclesiastical determination which was not subject to judicial abrogation, having been reached by the final church judicatory in which authority to make the decision resided."

The *Boden* lawsuit against St. Elizabeth illustrates the constitutional difficulties of limiting the church plan exemption to "houses of worship." Because a Roman Catholic religious order, the Franciscan Sisters, originated St. Elizabeth's pension plan in the mid-1960s, the specter of the 1977 IRS General Counsel Memorandum, *supra* pp. 15-16, looms over the *Boden* litigation. St. Elizabeth documented the official status of the Franciscan Sisters within the Catholic Church hierarchy as constituted by requisite church officials in

Rome, the Holy See of the Roman Catholic Church. K. Martens Decl., Appendix C, p. 64, ¶ 32. The Archbishop of Cologne first approved the Constitutions of this Order in 1851. In 1870, after extending their mission overseas, the Franciscan Sisters sought approval of the authorities in Rome to become a religious institute of pontifical right instead of merely a religious institute of diocesan right. After a thorough investigation, the Holy See granted definitive Roman Catholic Church approval to the Order in 1901. As a result of this investigation and investiture, the ecclesiastical authority of the Franciscan Sisters was no longer a matter of internal governance of the order, but was subject to the authority of the Holy See itself. *Id.* at pp. 64-67, ¶¶ 32-36.

Therefore, in civil law terms, the Catholic Church has definitively adjudicated the ecclesiastical status of the Franciscan Sisters and their position in the Church hierarchy, directly below the Roman Pontiff. Civil courts are prohibited from interfering with or overturning such internal governance decisions: "Our decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694, 704 (2012) (citing *Kedroff* and *Watson*).

Nevertheless, in opposing St. Elizabeth's motion to dismiss their Complaint, the *Boden* plaintiffs protested that the Franciscan Sisters are not the church because religious orders do not have the same standing in the Catholic Church as do, for example, dioceses of the Church. The First Amendment prohibits civil

courts from entertaining this objection. As this Court has explained, a civil court's analysis of ecclesiastical actions of a church judicatory "must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow" and that "this is exactly the inquiry that the First Amendment prohibits." *Milivojevich*, 426 U.S. at 713.

Moreover, the *Boden* plaintiffs insisted that the Franciscan Sisters, even if this religious order does equate to the Church, acted generally through civil corporate formalities in owning and operating the hospital and, in particular, in establishing the St. Elizabeth plan by their 1965 corporate resolution. G. Colvin Decl., Appendix A, p. 11, ¶ 27. Yet this Court has made clear that federal legislation cannot, consistent with the First Amendment, be permitted to adversely affect religious bodies merely on the basis that they operate in corporate form. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2767 (2014). By doing so, they merit the First Amendment protections afforded to individuals "who are associated with a corporation in one way or another." *Id.* at 2768.

As a consequence of their narrow church plan definition, the *Boden* plaintiffs are requiring the District Court to decide the disputed theological question of whether the Franciscan Sisters are the "church" for purposes of ERISA § 1002(33)(A). By obliterating the distinction between church and church-affiliated organizations in a more expansive version of an exempt church plan, Congress in 1980 replaced an off-limits

theological inquiry with a concrete and objectively verifiable examination of whether the putative church-associated entity shares common religious bonds and convictions with the church.

Even in a hierarchical organization like the Catholic Church, such theological questions are inevitable under Respondents' mandatory church establishment interpretation of § 1002(33). In the Roman Catholic Church, can only the Pope establish an exempt church plan? Can only a Bishop? Is the Pastor of a local parish the "church" for purposes of the ERISA church plan exemption? If so, then why not a pontifically erected religious order of professed women?

3. Congress' Constitutional Solution

Congress avoided these vexing ecclesiastical inquiries, which are even more endemic in connectional and other non-hierarchical churches, by extending the exemption to organizations, whether separately incorporated or not, which "share common religious bonds and convictions with that church." This neutral inquiry does not offend religious liberties guaranteed by the First Amendment, whereas a theological debate conducted by a civil court on the issue of whether the Franciscan Sisters have the authority to act in the name of the Catholic Church is offensive to the First Amendment. *Catholic Bishop*, 440 U.S. at 502. *See also McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013), where the Court of Appeals was asked to decide whether the Catholic Church erred in determining the status of a

person in a Catholic religious order. *Id.* at 978 ("But once again, insofar as she is simply disagreeing with the Holy See's denial that she is a nun or a sister, the federal judiciary has no authority to entertain the argument."). The Court of Appeals laid the groundwork for its *McCarthy* holding in *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), which distinguished between permissible factual inquiries and impermissible excursions by civil courts. *Id.* at 1038-39 (citing *Catholic Bishop*, 440 U.S. at 502). To inquire whether organizations share common religious bonds and convictions is a permissible factual inquiry. To probe whether a particular religious order, or more generally a "good works" religious organization, functions on behalf of its church, especially where the church has officially declared that it does, runs afoul of First Amendment protections recognized by this Court. Yet such inquiries invariably result from the narrow interpretation of the church plan definition endorsed by Respondents and their *amici*.

The same distinction applies to the narrow interpretation of subsection (C)(i) limiting "principal-purpose" organizations to independent pension boards. First, there is no such requirement in the church plan definition. Secondly, plan sponsors for decades have complied with the IRS interpretation that a "principal-purpose" organization may include an internal committee so long as the committee is controlled by or associated with a church. St. Elizabeth therefore requires that at least one-half of its pension committee members "believe in and follow the tenets of the Catholic Church."

Consistent with the above case law, a civil court may inquire into St. Elizabeth's procedures for making this determination, but absolutely may not inquire into a committee member's religious beliefs. "It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). In *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1261-1263 (10th Cir. 2008), the Court invoked this principle to support its conclusion that a state financial aid program involved excessive scrutiny and subjective evaluation of religious materials. Such scrutiny would result in impermissible second-guessing of religious beliefs and practices. *Id.* at 1261.

4. Constitutional Avoidance Doctrine

In construing statutes, this Court has consistently adhered to the "elementary rule [] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Skilling v. United States*, 561 U.S. 358, 406 (2010) (adopting a limiting construction of a criminal statute to avoid raising due process concerns). In applying the constitutional avoidance doctrine, the Court even resorted to construing a statute "against its most natural meaning." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2600-2601 (2012) (holding that the insurance mandate in the Affordable Care Act "can reasonably be read as a tax" thereby avoiding Commerce Clause concerns). And this Court, mindful of potential

unconstitutional fallout, rejected a literal reading of an immigration statute, explaining:

> It is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Zadvydas v. Davis, 533 U.S. 678, 689 (2001). Here, a broad rendering of ERISA paragraph (33) is required to avoid both an unworkable construction of the church plan provision as a whole, certainly not intended by Congress, and a constitutionally treacherous rendition of this statutory exemption.

The constitutional avoidance doctrine is especially appropriate where a holistic reading of ERISA § 1002(33) demands a broad interpretation consistent with the Congressional intent "to accommodate the differences in the beliefs, structures, and practices among our religious denominations." The doctrine is applicable even assuming that the Ninth Circuit is correct that its narrow interpretation is the "more natural reading" of the amended church plan definition. *Rollins*, 830 F.3d at 906. That interpretation runs headlong into the protections guaranteed to religious bodies by the First Amendment.

CONCLUSION

For the reasons stated above, the decisions of the Third, Seventh and Ninth Circuit Courts of Appeals should be reversed.

Respectfully submitted,

RICHARD G. MEYER
Counsel of Record
MARK D. GUILFOYLE
MARK R. HERVEY
DRESSMAN BENZINGER LAVELLE psc
207 Thomas More Parkway
Crestview Hills, Kentucky 41017
(859) 341-1881
rmeyer@dbllaw.com
Counsel for Amicus Curiae
St. Elizabeth Medical Center, Inc.

APPENDIX A

DECLARATION OF GARREN COLVIN

Comes now the Declarant, Garren Colvin, and having first been duly cautioned, declares as follows:

1. I have personal knowledge of the matters stated herein, based in part on my review of business records in the custody of Saint Elizabeth Medical Center, Inc. submitted as Exhibits A through DD.

2. I am the Chief Executive Officer ("CEO") of Saint Elizabeth Medical Center, Inc. ("St. Elizabeth"), a position I have held since being appointed by the St. Elizabeth Board of Trustees in June 2015. I was first employed at St. Elizabeth in 1983.

3. In 1991, I was baptized into the Catholic Church by Monsignor John Murphy at St. Agnes Catholic Church in Fort Wright, Kentucky. I am a parishioner of St. Joseph Catholic Church located in Crescent Springs, Kentucky.

4. Since joining the Catholic Church, I have been involved in a number of Catholic organizations. For eleven years, I was a member of the School Board at Notre Dame Academy in Park Hills, Kentucky. Until recently, I served on the Finance Committee of the Sisters of Notre Dame in Park Hills. I also served for nine years on the Hospital Board of the Sisters of Notre Dame Hospital Board, which sponsors St. Claire Medical Center in Morehead, Kentucky. From 2005 to 2014, I served on the Board of Trustees for Thomas More College in Crestview Hills, Kentucky. In that role, I was

responsible for ensuring that investment decisions for the College's endowment fund were in conformity with the teachings and tenets of the Catholic Church.

5. Prior to being named St. Elizabeth's CEO, I served as its Chief Operating Officer and Senior Vice President from January 1, 2011 through May 2015. Before then, I was St. Elizabeth's Chief Financial Officer for ten years. Except for a one-year interval in 1999 and 2000, I have been continuously employed by St. Elizabeth in various capacities on a full-time basis since graduating from Thomas More College in 1986. From 1983 to 1986, I was employed on a part-time basis as an accounting clerk at St. Elizabeth while still in college.

6. St. Elizabeth is a 501(c)(3) tax-exempt entity and is a Kentucky non-profit corporation. It operates six major hospital facilities located in Northern Kentucky: St. Elizabeth Covington; St. Elizabeth Edgewood; St. Elizabeth Florence; St. Elizabeth Fort Thomas, St. Elizabeth Williamstown and St. Elizabeth Falmouth. It also services patients throughout Northern Kentucky out of its hospice facility in Edgewood.

7. St. Elizabeth does business under several assumed names, including St. Elizabeth Healthcare. St. Elizabeth has at times previously been known as Saint Elizabeth Hospital, Covington, Kentucky. St. Elizabeth's official corporate name is Saint Elizabeth Medical Center, Inc.

HISTORY OF HOSPITAL

8. The Franciscan Sisters of the Poor founded St. Elizabeth Hospital in 1861. To acquire additional hospital property, the Sisters incorporated in 1868 as The Sisters of the Poor of St. Francis, Covington. A copy of the original Articles is being submitted as Exhibit A. This is the same Kentucky corporation which currently owns and operates Saint Elizabeth Medical Center. *See* the St. Elizabeth Articles and amendments, along with a summary and Secretary of State printout, being submitted as Exhibit B.

9. In 1959, the Sisters changed the name of their corporation to Franciscan Sisters of the Poor, Covington, Kentucky. In 1962, they again changed the corporate name to Saint Elizabeth Hospital, Covington, Kentucky. *See* the referenced Articles in Exhibit B. *See also* excerpts from the publication entitled "For the Centuries: St. Elizabeth Healthcare and Northern Kentucky 1861-2011," by Brian L. Hackett, Ph.D., submitted as Exhibit C. This book was published in commemoration of St. Elizabeth's first 150 years.

10. Between 1909 and 1951, the Franciscan Sisters acquired thirteen contiguous parcels of real estate situated in Covington, Kentucky under various names.[1]

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[1] These names include: Sisters of the Poor of St. Francis of St. Elizabeth's Hospital of Covington, Kentucky; Sisters of the Poor of St. Francis of St. Elizabeth Hospital; The Sisters of the Poor of St. Francis of Covington, Kentucky; The Sisters of the Poor of St. Francis of St. Elizabeth Hospital, Covington, Kentucky; The Sisters of the Poor of St. Francis; and The Little Sisters of the Poor of St.

See Exhibit D. These parcels constituted the campus of St. Elizabeth's Covington facility on 21st Street where the Sisters operated the hospital from 1914 to 1973, when they transferred sponsorship of the hospital to the Diocese of Covington. *See* Exhibit E. The Sisters also founded a School of Nursing on the Covington campus and a dormitory for nursing students. *See* Exhibit C.

11. On June 11, 1966, the thirteen parcels acquired by the Franciscan Sisters were conveyed into the name of St. Elizabeth Hospital, Inc., the then current name of the corporation. The deed includes the following purpose statement: "The purpose of this deed is to consolidate all of the various parcels of real estate owned by St. Elizabeth Hospital, Inc." *See* Exhibit F.

12. In 1966, the Franciscan Sisters decided that there ought to be a local board to oversee the operations of the hospital. *See* Exhibit G. The Sisters appointed four lay persons and seven Sisters to the new board, which for the first time conducted their meetings at St. Elizabeth in Covington. Previous meetings were held at the St. Claire Provincial House in Cincinnati. The first meeting of the local board was held at St. Elizabeth on September 20, 1967. *See* Exhibit H.

13. After the Franciscan Sisters created the local hospital board, the Sisters still owned and had the responsibility for the hospital. The Provincial Board still had to approve the hospital budget and still made all

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Francis, St. Elizabeth's Hospital, Covington, Kentucky. *See* Exhibit D.

appointments to the local hospital board. And the Sisters were still financing hospital improvements, including a $2 million remodeling and enhancement project, for which the Sisters had to obtain approval from *Sacra Congregatio pro Religiosis et Institutis Saecularibus*. *See* Exhibit I.

14. On April 1, 1968, the local board adopted a Resolution which incorporated the Catholic Church approach to caring for the sick and injured: "As Christ's love for man impelled the Church to establish hospitals, so we, in turn, must serve all men, regardless of race, creed, or financial status." *See* Exhibit J.

15. In 1969, the Franciscan Sisters purchased 290 acres in Edgewood, Kentucky, where the St. Elizabeth Edgewood facility was eventually constructed. St. Elizabeth Edgewood is St. Elizabeth's flagship hospital facility. Copies of this deed and related board minutes are being submitted as Exhibit K.

16. Between 1970 and 1974, eleven more parcels of Covington real estate were acquired in the corporate name as part of the Covington hospital campus. *See* Exhibit L.

ARTICLES AND BYLAWS

17. On March 29, 1977, an Amendment to the Articles of Incorporation was filed, changing the corporate name to Saint Elizabeth Medical Center, Inc. A copy of the Amendment is included in Exhibit B.

18. The most recent Articles were filed in 2008. The Eighth provision of these Amended and Restated Articles states as follows:

> Upon dissolution of the corporation, the Board of Trustees (Directors), after paying or making provision for the payment of all of the liabilities of the corporation, shall transfer all of the assets of the corporation to the Roman Catholic Diocese of Covington, Kentucky or its successor, for distribution to some other nonprofit corporation performing similar purposes and objectives as the corporation, provided that such corporation is then organized and operated exclusively for one or more exempt purposes within the meaning of Section 501(c)(3) of the Code.

See the referenced Articles in Exhibit B. This was a change from the earlier Articles, which provided that the corporate assets would be distributed to the Franciscan Sisters to be used for the same or similar purposes.

19. A copy of St. Elizabeth's Bylaws of September 12, 2011, signed by Most Reverend Roger Foys, D.D., Bishop of the Roman Catholic Diocese of Covington, Kentucky (the "Bishop") is being submitted as Exhibit M.

20. The following provisions in St. Elizabeth's 2011 Bylaws illustrate that St. Elizabeth's mission and operations are imbued with Catholic Church values:

> (a) St. Elizabeth "has been incorporated as Roman Catholic health organization[,]"

(b) St. Elizabeth "shall conduct its business and affairs in accordance with and subject to the traditions, teachings, and Canon Law of the Roman Catholic Church, the spirit and traditions of its Sponsor, and the *Ethical and Religious Directives for Catholic Health Care Services*, 4th Edition, as promulgated by the United States Conference of Catholic Bishops[,]"

(c) St. Elizabeth's Sponsor is the Bishop of the Diocese of Covington,

(d) the Bishop's prior approval is required for amendments or repeal of any provisions of St. Elizabeth's "Governing Documents," *i.e.*, its Articles and Bylaws, "relating to the authority of the Bishop or Board of Trustees of the Corporation[,]"

(e) the Bishop's prior approval is required for "[a]ny action that results in a substantial change, as determined by the Bishop or the Board, in the philosophy or mission of [St. Elizabeth], or in the use of a[n] St. Elizabeth hospital facility[,]"

(f) the Bishop's prior approval is required for "[t]he dissolution, consolidation, merger, or termination of existence of [St. Elizabeth,]"

(g) the Bishop's prior approval is required for "[a] borrowing, lease, transfer, or encumbrance of any real estate of [St. Elizabeth] exceeding $5,000,000[,]"

> (h) the Bishop approves or disapproves Trustees to serve on St. Elizabeth's Board from nominations made to him by the Board,
>
> (i) in consultation with St. Elizabeth's President or the Board Chair, the Bishop may remove Board members for crimes of moral turpitude, willful violations of the *Ethical and Religious Directives for Catholic Health Care Services*, or grave violations of Canon Law, and
>
> (j) "[c]riteria for selection of Trustees shall . . . include: support of the Catholic health ministry; commitment to the mission and values of [St. Elizabeth] and the Ethical and Religious Directives for Catholic Health Care Services[.]"

See Exhibit M, approved and signed by Bishop Foys.

21. These provisions were reiterated verbatim in the Bylaws of October 3, 2014, which the Bishop was not required to sign because the 2014 amendments did not pertain to the Bishop's oversight of St. Elizabeth. *See* Exhibit N.

22. Consistent with St. Elizabeth's Bylaws is the St. Elizabeth Mission Statement published on St. Elizabeth's publicly available website, a copy of which is being submitted as Exhibit O. St. Elizabeth's Mission Statement states that, "[a]s a Catholic healthcare ministry, we provide comprehensive and compassionate care that improves the health of the people we serve." *Id.* It further states that, "[a]s a Catholic health system, St. Elizabeth Healthcare strictly follows the

national Ethical and Religious Directives for Catholic Health Care Services." *Id.*

23. The Mission Statement page from the St. Elizabeth website also includes a link to the website maintained by the United States Catholic Conference of Bishops where the Ethical and Religious Directives for Catholic Health Care Services are published.

24. St. Elizabeth is listed as a Catholic institution in The Official Catholic Directory. It has qualified to appear in this publication every year since at least 1966. Copies of representative years are being provided as Exhibit P.

25. Each year, St. Elizabeth provides tens of millions of dollars in charity care and community benefits to hundreds of thousands of local residents. Copies of Form 990s filed by St. Elizabeth with the Internal Revenue Service in 2009, 2010, 2011, 2012, 2013 and 2014 are being submitted as Exhibit Q. They document the charity care and community benefits provided by St. Elizabeth as follows:

Year	Persons Served	Total Community Benefit Expense	Direct Offsetting Revenue	Net Community Benefit Expense	Percent of Total Expense
'09	134,046	$135,647,980	$72,808,988	$62,838,992	7.9
'10	151,906	132,448,128	74,894,951	57,553,177	8.2
'11	175,525	143,569,610	81,185,206	62,384,404	8.06
'12	237,728	148,039,019	90,592,753	57,446,266	7.31
'13	n/a	154,462,759	80,862,200	73,600,559	9.2
'14	n/a	190,995,219	125,421,646	65,573,573	7.96

26. Under the leadership of the local Bishop, the Diocese of Covington has sponsored St. Elizabeth since 1973. *See* Exhibit E. As part of this sponsorship, in 2007 Bishop Foys interviewed and approved the hiring of St. Elizabeth's Director of Pastoral Care. *See* the Declaration of Joseph G. Bozzelli, D.Min, BCC. The previous Director of Pastoral Care was Fr. Robert Ross, a Jesuit priest who served in that capacity for twenty-seven years.

HOSPITAL'S PENSION PLAN

27. St. Elizabeth is the employer under the terms of the St. Elizabeth Medical Center Employees' Pension Plan (the "St. Elizabeth Plan"). The Franciscan Sisters first established the Plan for St. Elizabeth employees in 1966 by adopting the 1964 Franciscan Plan. *See* Exhibits R, S and T. The Plan was last amended and restated effective January 1, 2009. A copy of the 2009 Plan is being submitted as Exhibit U.

28. In 1991, the Internal Revenue Service issued its opinion that the St. Elizabeth Plan qualified as an ERISA church plan. *See* Exhibit V.

29. Desiring to maintain its status as an exempt church plan, St. Elizabeth has never elected to be bound by ERISA under 26 U.S.C. § 410(d).

30. Since the St. Elizabeth Plan has been continuous since 1966, St. Elizabeth is still paying benefits to former employees who first became participants in

the Plan in the 1960s and 1970s. *See* the Plan participant information provided on a disk marked as Exhibit W. The three named Plaintiffs in this case, Dolores Jane Boden, Jeanine Godsey and Patricia Schaeffer, are each receiving benefits, or is scheduled to receive benefits, from the Plan and each has an initial date of participation in the Plan in the years 1973, 1983 and 1985, respectively.

31. St. Elizabeth has continuously made contributions to the Plan since 1966, including when the Franciscan Sisters converted to a multiple employer plan in 1976 and when St. Elizabeth withdrew from the multiple employer plan as of October 1, 1990. *See* the Notice from Human Resources explaining the 1990 withdrawal submitted as Exhibit X. Other than benefit payouts and expenses, St. Elizabeth's assets have remained in the Plan since 1966.

32. Although St. Elizabeth did terminate the pension plan for St. Luke Hospitals after the 2008 St. Luke/St. Elizabeth merger, and also terminated physician plans after it acquired a number of physician practices, St. Elizabeth has never terminated its own Plan which the Franciscan Sisters first established in 1966. For a history of the Plan, *see* the 2009 restated plan at Exhibit U, pp. 1-2.

33. Pursuant to Article VII of the St. Elizabeth Employee Pension Plan, the St. Elizabeth Board of Trustees is responsible for appointing an Administrative Committee (the "Committee") to manage and

administer the Plan. Specifically, Section 7.01(a) of the St. Elizabeth Pension Plan reads:

> The Board shall appoint an Administrative Committee to manage and administer the Plan. The Committee shall be the plan administrator and the named fiduciary of the Plan. The Committee shall consist of not fewer than three (3) members who believe in and follow the tenets of the Catholic Church. Committee members may, but need not, be Participants, directors, officers, or employees of the Employer.

See Exhibit U.

34. Beginning in the mid-1990s and continuing until appointed CEO last year, I served on the Committee either as an appointed member or as an ex officio member as a representative of the hospital's finance department. During that time, I observed that the investment policy of the Committee has always been consistent with tenets of the Catholic Church. No Plan investments have been allowed which would violate these tenets. *See* the St. Elizabeth investment policy, first adopted on November 21, 1989, being submitted as Exhibit Y. This policy is the same as, or very similar to, the Catholic investment policy with which I was responsible for adhering to as a member of, and advisor to, the Thomas More College Board of Trustees for nine years.

35. On September 12, 2011, the St. Elizabeth Board of Trustees adopted resolutions concerning, among other things, the funding of the St. Elizabeth

Employee Pension Plan. The seven-year funding policy provided as follows:

> 6. [T]hat the SEH Pension Plan be funded, beginning with the 2012 plan year of such plan, in annual installments, to be re-determined actuarially each year, intended to fund 100% of the plan's ongoing funding obligation (approximately 80% of the plan's projected benefit obligation as determined under the GAAP accounting assumptions currently used for purposes of SEH's financial statements) over the seven years beginning with 2012, provided that SEH's officers have discretion to slow the funding of such plan or request further direction by this Board of Trustees as to the continued funding of such plan to the extent that such officers determine that the cash flow needs of SEH and its affiliates and other financial conditions make the above-directed funding approach harmful to the financial condition of SEH and its affiliates[.]

See Exhibit Z.

36. The actuarial consulting firm used by St. Elizabeth in connection with its Plan has recently reported that, following significant contributions to the Plan over the last four years, 78% of the seven-year funding policy has been achieved. *See* the Declaration of Paul Foley, Senior Actuary with Transamerica Retirement Solutions, LLC. This projection is based on an actuarial analysis which takes into account future contributions and asset appreciation, as well as future Plan liabilities.

37. My reference to a 58% funding level in a letter sent to Plan participants was based on an accounting analysis provided by Transamerica, which is applicable only if the Plan were being liquidated. Both the 78% funding analysis and the 58% analysis were provided by Transamerica in connection with the seven-year funding policy which St. Elizabeth adopted in 2012. *See* Exhibits AA and BB.

38. Since the funding policy was adopted in 2011, despite lower investment returns on Plan assets and increased payout projections due to increasing life expectancy assumptions, St. Elizabeth has significantly reduced the funding gap with large contributions over the last four and one-half years as follows:

- 2012 – $27,200,000 (first year of new funding policy)
- 2013 – 22,208,000
- 2014 – $22,349,000
- 2015 – $33,300,000
- 2016 – $21,250,000 (through the first six months)

39. By Resolutions dated November 7, 2011 and March 2, 2015, the St. Elizabeth Board of Trustees resolved that:

> . . . in accordance with the terms of the St. Elizabeth Medical Center Employees' Pension Plan, the Board of Trustees (i) shall determine and make sure that all time at least half of the members of the Administrative Committee

> believe in and follow the tenets of the Catholic Church, (ii) shall, through such Board's power to remove and appoint committee members, take action whenever necessary to satisfy that requirement, and (iii) direct the Administrative Committee to administer the St. Elizabeth Medical Center Employees' Pension Plan in a manner consistent with the tenets of the Catholic Church and with said Plan's status as a church plan under applicable law.

See the Resolutions of November 7, 2011 and March 2, 2015, being submitted as Exhibits CC and DD.

40. To comply with these Resolutions, the St. Elizabeth Board of Trustees adjusts the membership of the Committee to assure that at least one-half of the Committee members are members of the Catholic Church at all times.

41. With the exception of the public records referenced herein, I certify that the documents referenced in this Declaration were created and are kept in the course of St. Elizabeth's regularly conducted business activity. And I certify that they were made contemporaneously by, or from information transmitted by, someone with knowledge of those matters.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 6, 2016.

/s/ Garren Colvin
GARREN COLVIN

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

Dolores Jane Boden, Jeanine Godsey, and Patricia Schaefer, on behalf of themselves and all others similarly situated, Plaintiffs, vs. St. Elizabeth Medical Center, Inc., The St. Elizabeth Medical Center Employees' Pension Plan Administrative Committee, and John Does 1-20, Defendants.	Civil Action No.: ___

COMPLAINT

Plaintiffs Dolores Jane Boden, Jeanine Godsey, and Patricia Schaefer, by and through their attorneys, on behalf of themselves and all others similarly situated, based on personal knowledge with respect to their own circumstances and based upon information and belief pursuant to the investigation of their counsel as to all other allegations, allege the following.

INTRODUCTION

1. This is a class action against Defendants St. Elizabeth Medical Center, Inc. ("St. Elizabeth" or the "Company"),[1] the St. Elizabeth Medical Center Employees' Pension Plan Administrative Committee (the "Administrative Committee"), and John Does 1-20 (the "Committee members") concerning the St. Elizabeth Medical Center Employees' Pension Plan (the "Plan").

2. As of June 30, 2012, the Plan was underfunded by more than $204 million. *See* Interim Unaudited Consolidated Financial Statements and Supplementary Information, Saint Elizabeth Medical Center, Inc. For the Six Months Ended June 30, 2012 (the "June 2012 Consolidated Financial Statements") at 51.

3. Indeed, an email letter sent to participants in the Plan (the "Participants") on February 23, 2016 from Garren Colvin, President and Chief Executive Officer of St. Elizabeth, informed Participants that as of December 31, 2015, the Plan was only 58% funded. *See* Colvin Letter attached as Exhibit A.

4. Defendants purport to justify the severe underfunding on the grounds that the Plan is a "Non-ERISA Church Plan" and therefore is exempt from the Employee Retirement Income Security Act of 1974, 29

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[1] In late 2008, St. Elizabeth Medical Center and the St. Luke Hospitals jointed to form what is now known as St. Elizabeth Healthcare. *See* http://www.stelizabeth.com/history.aspx. Plaintiffs use "St. Elizabeth" or the "Company" to refer to St. Elizabeth Medical Center, Inc., St. Elizabeth Healthcare, and any other affiliated entity.

U.S.C. § 1001, *et seq.* ("ERISA"). *See* Colvin Letter, Exhibit A.

5. To the contrary, as described herein, the Plan does not meet ERISA's requirements for the "church plan" exemption, because it was not "established," and is not "maintained" by a church. Rather, the Plan was established and is maintained by St. Elizabeth, which is a large healthcare company – not a church or a convention or association of churches.

6. As a result of its bogus claim that it is a church, the Company avoids its statutory retirement plan funding obligations to employees and thereby obtains a competitive advantage over other healthcare providers who meet their financial obligations to their employees.

7. Since the Plan is governed by all of the funding, fiduciary, and notice requirements of ERISA, this action seeks to require Defendants to comply with all of those requirements, and to pay damages and penalties as a result of their past failures to do so.

JURISDICTION AND VENUE

8. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the laws of the United States, and pursuant to 29 U.S.C. § 1332(e)(1), which provides for federal jurisdiction of actions brought under Title I of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA").

9. This court has personal jurisdiction over Defendants because they are headquartered and transact business in, or reside in, and have significant contacts with, this District, and because ERISA provides for nationwide service of process.

10. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because some or all of the violations of ERISA occurred in this District and Defendants reside and may be found in this District. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendants do business in this District and a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this District. A substantial part of the events or omissions giving rise to the claims asserted herein occurred within the Covington Jury Division.

PARTIES

Plaintiffs

11. Plaintiff Dolores Jane Boden is a citizen and resident of Anderson Township, Ohio. Plaintiff Boden was employed by St. Elizabeth as a registered nurse from 1968 until 1986, serving in numerous positions including head nurse of the coronary care unit. Plaintiff Boden is a current participant in the Plan.

12. Plaintiff Jeanine Godsey is a citizen and resident of Hebron, Kentucky. Plaintiff Godsey was employed by St. Elizabeth as a registered nurse for thirty

one years, from 1973 until her retirement in 2003. Plaintiff Godsey is a current participant in the Plan.

13. Plaintiff Patricia Schaefer is a citizen and resident of Union, Kentucky. Plaintiff Schaefer was employed by St. Elizabeth as a nurse for seventeen years, from 1980 to 1997. Plaintiff Schaefer is a current participant in the Plan.

Defendants

14. Defendant St. Elizabeth is a 501(c)(3) nonprofit corporation serving the Northern Kentucky/ Greater Cincinnati region. Defendant is headquartered in Edgewood, Kenton County, Kentucky 41017. Defendant St. Elizabeth can be served through its registered agent, Robert M. Hoffer, 207 Thomas More Parkway, Crestview Hills, Kentucky 41017. The St. Elizabeth Medical Center Pension Plan Summary Plan Description dated August 2002 (the "2002 SPD"), attached as Exhibit B, identifies St. Elizabeth as the "Plan Sponsor." *See* 2002 SPD at 16.

15. The 2002 SPD also notes that "[a]n Administrative Committee appointed by the Board of Trustees of St. Elizabeth Medical Center administers the plan and establishes rules and procedures for the Plan's operation." 2002 SPD at 14. *See also* 2002 SPD at 16 (noting that the members of the Administrative Committee "are appointed on a yearly basis by the Board of Trustees").

16. John Does 1-20 are the individual members of the Committee and members of any other committee(s) which administer the Plan. The identity of the members of the Committee, and any of the other committee(s) which was or were responsible for carrying out the provisions of the Plan, is currently not known. Upon information and belief, John Does 1-20 are senior executive officers of the Company who knew or should have known the facts alleged herein. The Committees and John Does 1-20 are hereafter collectively referred to as the "Committee Defendants."

CLASS ACTION ALLEGATIONS

17. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the class (the "Class") defined as follows:

> All participants in and beneficiaries of the St. Elizabeth Medical Center Employees' Pension Plan (the "Plan"). Excluded from the Class are Defendants and any individuals who are subsequently to be determined to be fiduciaries of the Plan.

18. The members of the Class are so numerous that joinder of all members is impractical. Upon information and belief, the Class includes thousands of persons.

19. Plaintiffs' claims are typical of the claims of the members of the Class because Plaintiffs' claims, and the claims of all Class members, arise out of the

same conduct, policies, and practices of Defendants as alleged herein, and all members of the Class are similarly affected by Defendants' wrongful conduct.

20. There are questions of law and fact common to the Class and these questions predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

A. Whether the Plan is covered by ERISA;

B. Whether the Plan Administrator failed to comply with ERISA's reporting and disclosure provisions;

C. Whether the Plan fiduciaries failed to fund the Plan and establish a funding policy in compliance with ERISA; and

D. Whether the Plan fiduciaries breached their fiduciary duties in failing to comply with the provisions of ERISA set forth above.

21. Plaintiffs will fairly and adequately represent the Class and have retained counsel experienced and competent in the prosecution of ERISA class action litigation. Plaintiffs have no interests antagonistic to those of other members of the Class. Plaintiffs are committed to the vigorous prosecution of this action, and anticipate no difficulty in the management of this litigation as a class action.

22. This action may be properly certified under either subsection of Rule 23(b)(1). Class action status

in this action is warranted under Rule 23(b)(1)(A) because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendant. Class action status also warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class that, as a practical matter, would be dispositive of the interests of other members not parties to this action, or that would substantially impair or impede their ability to protect their interests.

23. In the alternative, certification under Rule 23(b)(2) is warranted because Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

24. In the alternative, certification under Rule 23(b)(3) is also appropriate. A class action is superior to other available methods for the fair and efficient adjudication of the controversy within the meaning of Rule 23(b) and in consideration of the matters set forth in Rule 23(b)(3)(A)-(D). Because of the amount of the individual Class members' claims relative to the complexity of the litigation and the financial resources of the Defendants, few, if any, members of the Class would seek legal redress individually for the wrongs complained of herein. The maintenance of separate actions would place a substantial and unnecessary burden on

the courts, and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all Class members. Absent a class action, Class members will continue to suffer damages, and Defendants' misconduct will proceed without remedy.

SUBSTANTIVE ALLEGATIONS

A. Defendant's Business

25. St. Elizabeth is one of the oldest and largest medical providers in the Greater Cincinnati region, now operating seven facilities throughout Northern Kentucky – St. Elizabeth Covington, St. Elizabeth Edgewood, St. Elizabeth Falmouth, St. Elizabeth Florence, St. Elizabeth Ft. Thomas, St. Elizabeth Grant, and St. Elizabeth Owen. *See* http://www. stelizabeth. com/about.aspx.

26. St. Elizabeth also has vast resources to serve the Greater Cincinnati area, including almost 1,200 licensed beds, a physician organization which includes over 314 physicians and 71 mid-level providers (97 primary care and speciality office locations), more than 1,200 physicians with admitting privileges, more than 7,300 associates, three freestanding imaging centers, and two ambulatory surgery centers. *Id.*

27. The Company is not, and does not claim to be a church. The mission of St. Elizabeth concerns healthcare, not fulfilling the mission of any church:

> Our mission is to provide comprehensive and compassionate care that improves the health of the people we serve.

See: http://www. stelizabeth.com/about.aspx.

28. Similarly, the Company's stated "vision" does not contain any religious focus, but rather says "St. Elizabeth is the preferred destination for healthcare, where innovative professionals deliver the highest quality of care." *See* http://www.stelizabeth.com/Mission VisionValues.aspx.

29. Elsewhere on its website, St. Elizabeth identifies its "values" as follows:

> INNOVATION – I seek better ways to perform my work, find creative solutions, and embrace change.
>
> COLLABORATION – I understand that mutual respect and teamwork are critical to accomplishing goals. I work with others to achieve the best individual and collective outcomes.
>
> ACCOUNTABILITY – I use resources efficiently, respond to others promptly, face challenges in a timely manner, and accept responsibility for my actions and decisions.
>
> RESPECT – I respect the dignity and diversity of our associates, physicians, patients, family, and community members. I promote trust, fairness, and inclusiveness through honest and open communication.

> EXCELLENCE – I believe in serving others by pursuing excellence in healthcare. I compassionately care for the mind, body, and spirit of each patient.

See http://www.stelizabeth.com/MissionVisionValues.aspx.

30. The Company's June 2012 Consolidated Financial Statements further confirm this point, noting "St. Elizabeth Healthcare's primary mission is to provide health care services to the residents of Northern Kentucky and the Cincinnati metropolitan region." *See* June 2012 Consolidated Financial Statements at 5.

31. Further, the Company's Board of Trustees is not controlled by a church. The Company's website discusses the role Board members fulfill as follows: "As the governing body of St. Elizabeth Healthcare, the Board of Trustees approves strategic plans to establish the long-term direction and safeguard the mission and values of the 154-year old organization." *See* https://www.stelizabeth.com/NewsArticle.aspx?id=723

32. The Board of Trustees members currently listed on the Company's website include:

- Michael A. Conner
- Marsha Croxton
- Thomas R. Dietz
- Christopher L. Fister
- George S. Hall, M.D.

- Robert Hoffer
- Michael Jones, M.D.
- LaRoy Kendall, M.D.
- Tillie Hidalgo Lima
- Fred A. Macke, Jr.
- Gary W. Moore
- Heidi C. Murley, M.D.
- Roger Peterman
- James Roebker, M.D.
- Debbie Simpson
- James Votruba
- Robert Zapp

See http://www. stelizabeth.com/Board.aspx

33. Thus, of the seventeen (17) individuals on the Board, none are associated with the Church. That the entire Board is comprised of laypeople further underscores that St. Elizabeth is concerned with healthcare not religion.

34. In fact, in January 2015, three CEOs – Ms. Simpson, President and CEO of Multi-Craft Litho Corp.; Ms. Lima, President and CEO of Best Upon Request; and Mr. Zapp, President and CEO of the Bank of Kentucky – joined the Board, and a former university president (Mr. Votruba) was elected chairman. Mr. Votruba replaced former chairman Ted Robinson, a lawyer and CPA, who is the co-founder and managing

partner of River Cities Capital Funds, who stepped down from the St. Elizabeth Board after ten years. *See* "St. Elizabeth Healthcare Board Elects New Chairman," News Release, Jan. 28, 2015, available at: https://steh.com/Pages/About-Us/Board-of-Directors.aspx.

35. Further, the Company's "Corporate Officers" team is comprised entirely of laypeople. *See* https://steh.com/Pages/About-UsBoard-of-Directors.aspx.

36. Corporate President Garren Colvin, who was named CEO in June 2015 has a business background and has served, among other roles, as the Company's VP of Finance and CFO. *See* http://www.wcpo.com/news/local-news/kenton-county/edgewood/garren-colvin-named-st-elizabeth-healthcare-ceo.

37. Corporate Vice President Gary Blank started with St. Elizabeth in 1981 as a nursing assistant and served in various nursing and director roles, including senior vice president of professional services since 2011. *See* http://www.bizjournals.com/cincinnati/blog/2013/02/stelizabeth-promotes-senior-vp.html.

38. Corporate Treasurer Lori Ritchey-Baldwin, who was named Chief Financial Officer in December of 2014, has a business and finance background, serving as vice president, controller, and chief accounting officer at Chiquita Brands International from 2008 to 2012 and audit manager at Deloitte & Touche Professional Services prior to joining St. Elizabeth Healthcare. *See* http://www.beckershospitalreview.com/hospital-executive-moves/stelizabeth-healthcare-names-lori-ritchey-baldwin-cfo.html.

39. The last member of the "Corporate Officers" team is Barbara L. Krohman, the Company's Corporate Secretary.

40. The fact that none of the members of the Board of Trustees or the Corporate Officers are associated with the church underscores that St. Elizabeth is a business, not a church.

41. The Company's connection to religion is only historic. For example, the "Organization and Mission" section of the Company's June 2012 Consolidated Financial Statements notes "Saint Elizabeth Medical Center, Inc. (St. Elizabeth Healthcare) is a Kentucky Corporation founded by the Franciscan Sisters of the Poor in 1861. Sponsorship of St. Elizabeth Healthcare was transferred in 1973 to the Roman Catholic Diocese of Covington, Kentucky." June 2012 Consolidated Financial Statements at 5. *See also* http://www.stelizabeth.com/about.aspx ("St. Elizabeth Healthcare is sponsored by the Diocese of Covington").

42. However, there is no discussion of what the Diocese of Covington's "sponsorship" of St. Elizabeth entails or requires, or whether it even currently exists.

43. At bottom, upon information and belief, the Company is not required to follow any religious beliefs, practices, rules, restrictions, directions, or guidelines.

44. Despite its status as an ERISA plan, the Company has invoked Church Plan status to evade ERISA's protections to which its employees are entitled. *See, e.g.*, Colvin Letter, Exhibit A ("As a

Non-ERISA Church Plan, we are not required to follow ERISA minimum funding requirements."); 2002 SPD at 15 ("Certain provisions of the Employee Retirement Income Security Act of 1974 (ERISA) do not apply to church plans.").

45. The Company's failure to treat the Plan as an ERISA plan puts the Plan's participants at risk of receiving pension payouts drastically lower than those proposed, and deprives Plan participants of material information concerning this substantial risk as alleged below.

46. Moreover, by avoiding ERISA's requirements, the Company obtains a competitive advantage over the other nonprofit healthcare entities that protect the retirements of their employees under ERISA.

B. The Plan

(1) St. Elizabeth Medical Center Employees' Pension Plan Overview

47. St. Elizabeth maintains the Plan for its employees. The Plan was established and maintained by the Company to provide retirement income to employees.

48. The Plan is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(a)(A).

49. The Plan is a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35).

50. The 2002 SPD notes that the "effective date of the original plan is January 1, 1966," and that this "restated plan is effective October 1, 1990, with certain revisions effective as recently as 2001." 2002 SPD at 4.

51. The Plan year is the 12-month period beginning January 1 and ending on December 31. *See id.*

52. St. Elizabeth employees become participants in the Plan on the January 1 following the date they: (a) reach age 20 1/2, complete 6 calendar months of employment, and (b) are expected to work 1,000 hours or more during the Plan Year. *See* 2002 SPD at 5.

53. Plan participants are vested "upon the completion of five years of Continuous Service." *See id.* at 4.

54. The Plan's definition of "Continuous Service" has changed over the years, but [a]fter January 1, 1976, Continuous Service is the number of years in which you were credited with 1,000 or more Hours of Service." *Id.* at 2. The 2002 SPD also informs that, [f]or plan years beginning after January 1, 1981, you may be credited with a partial year of Continuous Service in your first year of employment and in your last year of employment, based on the ratio of your actual Hours of Service to 1,000 hours." *Id.* at 2-3.

55. The Plan's "normal retirement date" is the "last day of the month in which you reach age 65, if you have completed 5 years of Continuous Service." *Id.* at 4.

56. The 2002 SPD informs Plan participants that if they retire on their "Normal Retirement Date, you may begin receiving monthly pension payments." *Id.* at 6.

57. The 2002 SPD also notes Plan participants will "normally receive a monthly pension for your lifetime." *Id.* at 11. However, if desired, Plan participants can choose to receive their pension in a few optional forms of payment, including a lump sum benefit or in installments. *See id.* at 11-12.

58. St. Elizabeth has the power to continue, amend, or terminate the Plan. Specifically, the 2002 SPD notes: "The pension plan has been established to provide long-term benefits for participants over an indefinite period of time. Naturally, it is intended that the plan will continue, but if circumstances prevent this, the plan can be terminated." 2002 SPD at 13. In other words, the Company maintains the Plan.

59. The 2002 SPD states that "[t]he St. Elizabeth Medical Center Employees' Pension Plan has been made available to provide you and your family additional income during your retirement years." 2002 SPD at 1. *See also id.* at 12 ("St. Elizabeth Medical Center funds the plan solely for the benefit of plan members and their beneficiaries.").

60. Notwithstanding the fact that the Plan is only 58% funded, the 2002 SPD further promises: "Contributions into your pension plan are made entirely by St. Elizabeth Medical Center. Each year St. Elizabeth Medical Center contributes to the plan an

amount of money that is needed to provide retirement benefits." *Id.* at 5.

61. Upon information and belief based on a review of similar plans of healthcare companies that wrongfully claim to be "church plans," the Company has no legal obligation to provide any funding to the Plan. Accordingly, retirement benefits are only available from the substantially underfunded assets of the Plan and whatever additional amounts the Company wishes to contribute in its sole discretion. Consequently, in the absence of the funding requirements provided by ERISA, in the event the Company elects not to fund the Plan, or terminates the Plan, both of which it can do in its sole discretion, participants would be denied a substantial portion of the retirement benefits they have been promised.

62. Regarding the administration of the Plan, the 2002 SPD notes: "An Administrative Committee appointed by the Board of Trustees of St. Elizabeth Medical Center administers the plan and establishes rules and procedures for the Plan's operation." 2002 SPD at 14.

63. The members of the Administrative Committee are appointed on a yearly basis by the Board of Trustees. *See id.* at 16.

64. Thus, at all relevant times, the Committee Defendants have been the Administrators of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A). They have also been fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29

U.S.C. § 1002(21)(A) because they have exercised authority or control respecting management or disposition of Plan assets, or has had discretionary authority or discretionary responsibility in the administration of the Plan.

65. The 2002 SPD also identifies St. Elizabeth Medical Center as the "Plan Sponsor." *See* 2002 SPD at 16.

66. The Company is a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) because it has exercised authority or control respecting management or disposition of Plan assets, or has had discretionary authority or discretionary responsibility in the administration of the Plan.

67. In particular, the Company, acting through its Board of Trustees, Corporate Officers, officers, and employees, is responsible for all of the acts alleged herein. Additionally the Company has also been a party-in-interest under ERISA § 3(14), 29 U.S.C. § 1002(14), both because it is a fiduciary and because it is an employer whose employees are covered by the Plan.

(2) The St. Elizabeth Medical Center Employees' Pension Plan is not a "Church Plan" under ERISA

68. The Plan is not an ERISA "Church Plan."

69. As alleged above, several factors demonstrate that St. Elizabeth is not a religious institution. *See* ¶¶ 25-43.

70. Under Section 3(33)(A) of ERISA, 29 U.S.C. § 1002(33)(A), a plan must be both ***established*** and ***maintained*** by a ***church*** or by a convention or association of churches to qualify for the church plan exception.

71. The Plan was ***established*** by the Company or its predecessors, not by a church or convention or association of churches.

72. The Plan is ***maintained*** by the Company, not by a church or convention or association of churches.

73. Additionally, Section 3(33)(C)(i) of ERISA, 29 U.S.C. § 1002(33)(C)(i), provides that a plan maintained by a church or a convention or association of churches includes a plan

> ***maintained*** by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

74. Since the Plan is maintained by a healthcare company, the Plan is ***not*** maintained by "an organization . . . the principal purpose of which is the administration or funding of a plan or program for the provision of retirement benefits. . . ." 11 U.S.C. § 1002 (33)(C)(i).

75. Moreover, the Plan is not maintained for employees of any church or convention or association of churches. It is maintained for employees of the Company – ***a hospital system.***

C. Defendants Breaches of Fiduciary Duties

(1) Defendants Breached their Fiduciary Duty to Ensure the Plan is Fully Funded

76. Under ERISA, the Plan must have an annual actuarial report assessing the plan's funding needs. *See* ERISA § 103(d), 29 U.S.C. § 1023(d).

77. Defendants are further required to fund the Plan each year according to a funding plan each year that meets the funding standard of ERISA and is based on reasonable actuarial assumptions. *See* ERISA §§ 302, 303, 29 U.S.C. §§ 1083, 1083.

78. Defendants are responsible for setting the funding requirements and the funding policy for the Plan.

79. Defendants failed to set a funding policy that will adequately fund the anticipated obligations of the Plan or fund the Plan.

80. As of June 30, 2012, the Plan was underfunded by more than $204 million. *See* Interim Unaudited Consolidated Financial Statements and Supplementary Information, Saint Elizabeth Medical Center, Inc. For the Six Months Ended June 30, 2012 (the "June 2012 Consolidated Financial Statements") at 51.

81. Indeed, a February 23, 2016 email letter from Garren Colvin, President and Chief Executive Officer of St. Elizabeth, informed Participants that as of December 31, 2015, the Plan was only 58% funded. *See* Colvin Letter, Exhibit A.

(2) Defendants Breached their Fiduciary Duty to Avoid Conflicts of Interest

82. By continuing to set an inadequate funding policy and following that policy, which has resulted in the Plan becoming underfunded by over two hundred million dollars, Defendants have acted at all times in the interest of the Company, and have not acted solely in the interests of the Plan participants as is required of a fiduciary under ERISA.

83. St. Elizabeth benefits from Defendants' decision not to adequately fund the Plan, and Defendants have a conflict of interest that prevents them from carrying out their fiduciary duties in a manner consistent with ERISA.

84. Despite this conflict of interest, St. Elizabeth has failed to appoint fiduciaries who could carry out

their duties to protect the Plan's participants in a manner consistent with ERISA or to take other appropriate steps to address the conflict.

85. As a result of this conflict of interest, and in light of Defendants' repeated and ongoing breaches of fiduciary duties, the Court should appoint an independent fiduciary who can protect the interests of Plan participants and carry out his or her duties consistent with ERISA.

FIRST CLAIM FOR RELIEF
Declaratory and Equitable Relief
(Declaratory Judgement Act and
ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3))

86. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint.

87. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action to: "(A) enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

88. Pursuant to this provision, 28 U.S.C. § 2201 and 2202, and Federal Rule of Civil Procedure 57, Plaintiffs seek declaratory relief that the Plan is not a "church plan" within the meaning of ERISA § 3(33), 29 U.S.C. § 1002(33), and is thus subject to the provisions of Title I and Title IV of ERISA.

89. Plaintiffs further seek orders directing all Defendants to bring the Plan into compliance with ERISA, including the reporting and funding requirements of ERISA, 29 U.S.C. §§ 1021, 1023, 1082, 1102, and 1104, and by remedying the additional violations set forth below.

90. Additionally, Plaintiffs seek an order that St. Elizabeth make all contributions to the Plan as necessary to remedy the Plan's funding shortfall.

SECOND CLAIM FOR RELIEF
Violation of Reporting and Disclosure Provisions (ERISA §§ 101-104, 502(a)(1)(A), (a)(3), 29 U.S.C. §§ 1021-1024, 1132(a)(1)(A), (a)(3))

91. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint.

92. ERISA § 502(a)(1)(A), 29 U.S.C. 1132(a)(1)(A), permits a plan participant to bring a suit for penalties when a defendant violates the recordkeeping obligations set forth in ERISA.

93. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

A. Annual Reports

94. Under ERISA § 103, 29 U.S.C. § 1023, employee benefit plans are required to file an annual report with the Secretary of Labor. This report, submitted via Form 5500, must include certain specified information about the plan's finances, participants, and administration.

95. Defendants failed to file an annual report concerning the Plan with the Secretary of Labor in compliance with ERISA § 103, 29 U.S.C. § 1023, or a Form 5500 and associated schedules and attachments which the Secretary has approved as an alternative method of compliance with ERISA § 103, 29 U.S.C. § 1023.

96. Defendants have violated ERISA § 104(a), 29 U.S.C. § 1024(a), by failing to file annual reports with respect to the Plan with the Secretary of Labor in compliance with ERISA § 103, 29 U.S.C. § 1023, or Form 5500s and associated schedules and attachments.

B. Notification of Failure to Meet Minimum Funding Standards

97. Under ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1), employers maintaining employee benefit plans are required to issue a notice to beneficiaries and participants whenever the plan fails to make a required installment or other payment required to meet the minimum funding standards under ERISA.

98. St. Elizabeth has failed to furnish the Plaintiffs or any member of the Class with a Notice with respect to the Plan pursuant to ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1), informing them that the Health System failed to make payments required to comply with ERISA § 302, 29 U.S.C. § 1082.

C. Funding Notices

99. Under ERISA § 101(f), 29 U.S.C. § 1021(f), administrators of defined benefit plans are required to provide annual plan funding notices to all participants and beneficiaries of such defined benefit plans.

100. At no time has the Committee furnished Plaintiffs or any member of the Class with a Funding Notice with respect to the Plan pursuant to ERISA § 101(f), 29 U.S.C. § 1021(f).

101. As the Administrator of the Plan, the Committee has violated ERISA § 101(f), 29 U.S.C. § 1021(f), by failing to provide each participant and beneficiary of the Plan with the Funding Notice required by ERISA § 101(f), 29 U.S.C. § 1021(f), and as such may be required by the Court to pay Plaintiffs and each Class member up to $110 per day (as permitted by 29 C.F.R. § 2575.502(c)(3)) for each day that the Committee has failed to provide Plaintiffs and each Class member with the Funding Notice required by ERISA § 101(f), 29 U.S.C. § 1021(f).

THIRD CLAIM FOR RELIEF
Failure to Provide Minimum Funding
(ERISA §§ 302 and 502(a)(3),
29 U.S.C. §§ 1082, 1132(a)(3))

102. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint.

103. ERISA § 302, 29 U.S.C. § 1082, establishes minimum funding standards for defined benefit plans that require employers to make minimum contributions to their plans so that each plan will have assets available to fund plan benefits if the employer maintaining the plan is unable to pay benefits out of its general assets.

104. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

105. As the employer maintaining the plan, St. Elizabeth was responsible for making the contributions that should have been made pursuant to ERISA § 302, 29 U.S.C. § 1082, at a level commensurate with ERISA's requirements.

106. St. Elizabeth has failed to make contributions in satisfaction of the minimum funding standards of ERISA § 302, 29 U.S.C. § 1082.

107. By failing to make the required contributions to the Plan, St. Elizabeth has violated ERISA § 302, 29 U.S.C. § 1082.

108. As a result of the failure of St. Elizabeth to fund the Plan in accordance with ERISA's minimum funding standards, Plaintiffs face a substantial risk of their pensions being lost or severely reduced.

FOURTH CLAIM FOR RELIEF
Failure to Establish the Plan Pursuant to a Written Instrument Under ERISA (ERISA §§ 402, 502(a)(3), 29 U.S.C. §§ 1102, 1132(a)(2))

109. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint.

110. ERISA § 402, 29 U.S.C. § 1102, provides that every plan will be established pursuant to a written instrument which will, among other things, "provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of [Title I of ERISA]."

111. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

112. The Plan has not been established pursuant to a written instrument meeting the requirements of ERISA § 402, 29 U.S.C. § 1102.

113. As St. Elizabeth has been responsible for maintaining the Plan and has amendment power over the Plan, it violated § 402, 29 U.S.C. § 1102, by failing to promulgate written instruments in compliance with

these sections to govern the Plan operation and administration.

FIFTH CLAIM FOR RELIEF
Breach of Fiduciary Duty (ERISA §§ 404, 409, 502(a)(2), 29 U.S.C. §§ 1104, 1109, 1132(a)(2))

114. Plaintiffs re-allege and incorporate herein by reference all prior allegations in this Complaint.

115. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides that a fiduciary shall discharge his/her duties with respect to a plan solely in the interest of the participants and beneficiaries, and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

116. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach, and to restore to the plan any profits the fiduciary made through the use of the plan's assets. ERISA § 409 further privies that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

117. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring a suit for relief under ERISA § 409.

118. As a fiduciary of the Plan, Defendants had the duty to comply with and enforce the provisions of ERISA alleged above.

119. Defendants have not complied with and/or enforced any of the provisions of ERISA set forth above with respect to the Plan.

120. By failing to enforce the provisions of ERISA set forth above, Defendants have breached their fiduciary duties.

121. The failure of Defendants to create and enforce adequate funding policies for the Plan, and properly fund the Plan, has resulted in a loss to the Plan equal to the foregone funding and earnings thereon, and this failure has profited St. Elizabeth by providing it the use for its general business purposes of money that it should have paid to the Plan.

122. Plaintiffs are entitled to recover those losses on behalf of the Plan.

JURY DEMAND

123. Plaintiffs demand a jury.

PRAYER FOR RELIEF

124. WHEREFORE, Plaintiffs pray that judgment be entered against Defendants on all claims and requests that the Court awards the following relief:

A. Certifying this action as a class pursuant to FED. R. CIV. P. 23;

B. Declaring that the Plan is an employee benefit plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), is a defined benefit pension plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), and is not a Church Plan within the definition of ERISA § 3(33), 29 U.S.C. § 1002(33);

C. Ordering Defendants to bring the Plan into compliance with ERISA, including, but not limited to, requiring Defendants to fund the Plan in accordance with ERISA's funding requirements, disclose required information to the Plan's participants and beneficiaries, and otherwise comply with all other reporting, vesting, and funding requirements of Title I of ERISA;

D. Requiring Defendants to make the Plan whole for all contributions that should have been made pursuant to ERISA funding standards, and for interest and investment income on such contributions, and requiring Defendants to disgorge any profits accumulated as a result of their fiduciary breaches;

E. Granting a preliminary and permanent injunction removing Defendants as Plan fiduciaries, and appointing one or more independent fiduciaries to hold

the Plan assets in trust, to manage and administer the Plan and its assets, and to enforce the terms of ERISA;

F. Requiring the St. Elizabeth Medical Center Employees' Pension Plan to pay a civil money penalty of up to $110 per day to Plaintiffs and each Class member for each day it failed to inform Plaintiffs and each Class member of its failure to fund the Plan in accordance with ERISA's requirements;

G. Requiring St. Elizabeth to pay a civil money penalty of up to $110 per day to Plaintiffs and each Class member for each day it failed to inform Plaintiffs and each Class member with a Funding Notice;

H. Ordering declaratory and injunctive relief as necessary and appropriate, including enjoining the Defendants from further violating the duties, responsibilities, and obligations imposed on them by ERISA, with respect to the Plan;

I. Awarding, declaring, or otherwise providing Plaintiffs and the Class all relief under ERISA § 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper, and such appropriate equitable relief as the Court may order, including an accounting, surcharge, disgorgement of profits, equitable lien, constructive trust, or other remedy; and

J. Awarding to Plaintiffs' counsel attorneys' fees and expenses as provided by the common fund doctrine, ERISA § 502(g), 29 U.S.C. § 1132(g), and/or other applicable doctrine. Dated: March 17, 2016

Respectfully submitted,

/s/Erik D. Peterson

ERIK D. PETERSON
MEHR, FAIRBANKS & PETERSON TRIAL LAWYERS, PLLC
201 West Short Street, Suite 800
Lexington, Kentucky 40507
Telephone: 859-225-3731
Facsimile: 859-225-3830
Email: edp@austinmehr.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Edward W. Ciolko
(*pro hac vice* motion to be filed)
Donna Siegel Moffa
(*pro hac vice* motion to be filed)
Mark K. Gyandoh
(*pro hac vice* motion to be filed)
Julie Siebert-Johnson
(*pro hac vice* motion to be filed)
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
Email: eciolko@ktinc.com
Email: dmoffa@ktinc.com
Email: mgyandoh@ktinc.com
Email: jsjohnson@ktinc.com

IZARD NOBEL LLP
Robert A. Izard
(*pro hac vice* motion to be filed)
Mark P. Kindall
(*pro hac vice* motion to be filed)
29 South Main Street

Suite 305
West Hartford, CT 06107
Tel: (860) 493-6292
Fax: (860) 493-6290
Email: rizard@izardnobel.com
Email: mkindall@izardnobel.com

Counsel for Plaintiffs

APPENDIX C

DECLARATION OF KURT MARTENS, J.C.D.

Comes now the Declarant, Kurt Martens, J.C.D., and having first been duly cautioned, states as follows:

1. My name is Kurt Martens, and I am employed at The Catholic University of America located in Washington, D.C. I am an ordinary professor teaching in the School of Canon Law. A copy of my curriculum vitae and a list of my publications are attached.

2. From 1997 through 2005 I was research assistant in canon law and taught canon law at the Katholieke Universiteit Leuven (hereafter: K.U. Leuven – in English translation: Catholic University Leuven). Since 2005 I have been first an assistant professor (2005-2009), then an associate professor (2009-2015), and now an ordinary professor (since 2015) in canon law at the Catholic University of America with continuous tenure. The School of Canon Law is an ecclesiastical school or faculty, which means that, for tenure purposes, I needed, in addition to the vote of the Board of Trustees, a positive vote of the Bishop-Members of the Board of Trustees and the *nihil obstat* of the Congregation for Catholic Education (part of the Roman Curia) in Rome. In August 2015, I was promoted to ordinary professor.

3. I have been a visiting professor at the Faculty of Canon Law of St. Paul University in Ottawa, Canada, and at the Institute for Canon Law at the University Marc Bloch in Strasbourg, France. Since 2012, I have

been the editor of *The Jurist*, the only academic journal on canon law published in the United States. This journal is published twice a year by The Catholic University of America press. As editor, I review all manuscripts before sending them through a process of double-blind peer review. When I deem a manuscript worthy of consideration, three reviewers look at the manuscript and send me their independent opinion about the publishability of the manuscript. A decision about publication is made by me after I have received the reviews.

4. I hold a doctorate in canon law awarded by K.U. Leuven. K.U. Leuven is a European university located in Leuven, Belgium. The university has been in existence for almost 600 years (founded in 1425) and is the oldest existing Catholic University in the world. Prior to receiving my doctorate in canon law, I received a licentiate degree in canon law also from K.U. Leuven. A licentiate degree is the equivalent of an American masters degree. I also hold a Belgian bachelors degree and a licentiate degree in law. The licentiate degree in law is the equivalent of an American J.D. degree in law.

5. In the last four years, I have testified as an expert by deposition in Chavies v. Catholic Health East, United States District Court, Eastern District of Pennsylvania, Civil Action No. 13-1645.

6. I am being compensated for the work on this case at a flat fee of $5,000 for my study and testimony in this matter.

7. As explained below, under canon law, which is the law of the Catholic Church, the Franciscan Sisters of the Poor (who started St. Elizabeth Hospital in 1861) are considered an official part of the hierarchy of the Church. St. Elizabeth Hospital (whose formal corporate name is St. Elizabeth Medical Center, Inc.) is closely associated with the Catholic Church through the sponsorship of the Diocese of Covington, which began in 1973 and has continued to the present. These conclusions are based on my expertise as a canon lawyer, on my review of the declarations, with exhibits, of Garren Colvin, the CEO of St. Elizabeth Hospital, Most Reverend Roger J. Foys, Bishop of Covington, and Joseph G. Bozzelli, the Catholic Chaplain of St. Elizabeth, and on my review of the exhibits referenced in my declaration.

I. Canon Law

8. Canon law is the body of law of the Catholic Church (hereafter "the Catholic Church" or "the Church"). The Catholic Church has one of the oldest continuous legal systems in the Western World. From its inception, the Church adopted and thereafter developed norms and rules for governance. The influence of canon law is found throughout the civil law and common law developed in Europe. Originally, canon law was loosely structured, and the canonical legislation was spread throughout various canonical collections. In the 19th century, bishops asked the pope for a more organized system of canon law and asked for a codification of canon law, after the example of the

codification movement in several countries throughout Europe. Such a formal request for a codified canon law to the pope was very clear around the time of the First Vatican Council (1869-1870). When the First Vatican Council ended abruptly in 1870 after the fall of the Papal States and the unification of Italy, the plans for a codification of canon law were abandoned, at least for a while. Yet, Pope St. Pius X started the codification in 1904. His successor, Pope Benedict XV, would promulgate the 1917 Code of Canon Law on May 27, 1917 (the "1917 Code"). The Code took effect on May 19, 1918, and remained in force until it was replaced with the 1983 Code of Canon Law. The 1917 Code of Canon Law is also known as the Pio-Benedictine Code, because the work started under Pius X and was finished and completed under Benedict XV.

9. When, on January 25, 1959, Pope St. John XXIII called for an ecumenical council, now known as Vatican II, he at the same time also asked for a revision of the 1917 Code of Canon Law in light of the decisions and developments during the Council. Shortly after the end of Vatican II, the work for the revision of the 1917 Code of Canon Law started. It ultimately resulted in the current Code of Canon Law promulgated by Pope St. John Paul II on January 25, 1983 (the "1983 Code"). The 1983 Code of Canon Law thus replaced the 1917 Code of Canon Law and entered into force on the first Sunday of Advent, which was on November 27, 1983.

10. The mistake is often made to refer to the 1983 Code of Canon Law as the only source of law in the Church. That is not correct. The 1983 Code of Canon

Law is universal law for the Latin Church, that is, it is the law for the whole Latin Church. In addition to the 1983 Code of Canon Law (for the Latin Church), St. John Paul II promulgated on October 18, 1990, the Code of Canons for the Eastern Churches (CCEO). This codified law for the *sui iuris* Churches that make up the Eastern Catholic Churches came into force on October 1, 1991. While the Latin and Eastern Codes contain the main universal law and the basic principles, there is more.

11. In addition to the two Codes, there is other universal law, that is, law applicable to the whole Church. Often, the 1983 Code of Canon Law will have only something general on a particular issue, while the details are taken care of in this special universal law. Such is for instance the case for the organization of the Roman Curia: only two general canons (1983 Code of Canon Law, cc. 360-361) and four canons on the tribunals of the Apostolic See (1983 Code of Canon Law, cc. 1442-1445) are found in the 1983 Code of Canon Law; canon 360 refers specifically to the special law, which is the aforementioned apostolic constitution *Pastor bonus*, for the constitution and competence of the various departments of the Roman Curia.

12. Not included in the codifications of 1917 and 1983, but also part of the canonical system are the concordats and other international treaties concluded between the Holy See and a nation or a state. Such concordats are being agreed to until today and certain areas of the world have a tradition of concordats (Italy, Spain, Germany and the German states, certain South

American countries, etc.). Concordats will often explicitly recognize canon law and make it enforceable, sometimes even before secular courts.

13. Apart from the universal law, that is the law applicable to the entire (Latin) Church worldwide, there is particular law, which is law given for a particular territory, group, or community.

14. A diocesan bishop is entrusted with all ordinary, proper and immediate power which is required for the exercise of his pastoral function except for cases which the law or a decree of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority. Cf. 1983 Code of Canon Law, c. 381 §1. The diocesan bishop governs the particular Church entrusted to him with legislative, executive, and judicial power according to the norm of law. Cf. 1983 Code of Canon Law, c. 391 §1. Thus, a diocesan bishop can, for his diocese, promulgate particular law, that is, law on a particular subject that is in force for his diocese. This particular law cannot be contrary to universal law, and cannot concern a subject matter reserved to another ecclesiastical authority. In sum, the particular law duly promulgated for a diocese is also part of canon law.

15. A conference of bishops is a permanent institution and is a group of bishops, usually all the bishops of one nation, or at least a certain territory, who jointly exercise certain pastoral functions for the Christian faithful of their territory in order to promote the greater good which the Church offers to humanity, especially through forms and programs of the apostolate

fittingly adapted to the circumstances of time and place, according to the norm of law. Cf. 1983 Code of Canon Law, c. 447. A conference of bishops can only issue legislation – with a technical term called general decrees – in cases where universal law has prescribed it or when a special mandate of the Apostolic See has been given, either at the request of the episcopal conference or *motu proprio*. Thus, the legislative power of the conference of bishops is limited, nevertheless, also at this level, particular legislation is possible and exists. Such particular legislation also belongs to what we call canon law.

16. Last but not least, religious communities are governed by their own laws, also known as their proper law. While the 1983 Code of Canon Law sets general norms that govern religious life, or better, norms that govern institutes of consecrated life and societies of apostolic life, these general norms of the 1983 Code of Canon Law are not enough. These general norms on institutes of consecrated life and societies of apostolic life refer constantly to proper law to further specify rights and obligations, governance of the institutes and societies, etc. This proper law is also part of what we call canon law.

17. Canon law is not produced through a parliamentary process where the game between majority and minority determines the outcome of a debate and a vote. Rather, it is important to take into account that canon law is deeply rooted in Sacred Scripture, in the tradition of the Church, and in the teachings of the Church

(comprised of conciliar documents, papal and episcopal magisterium).

18. In sum, it is important to understand that canon law is more than the Code of Canon Law, and that there can be a lot of variation in canon law, depending on place and personal circumstances, and, of course, the applicable sources of law.

II. Organization of the Catholic Church

19. It is very easy for outsiders to see the organization of the Catholic Church as monolithic and overly hierarchical. However, that is not really true, because, in reality, each entity has its own responsibilities and powers, and a complex system of checks and balances is in place. The organization of the Catholic Church is not comparable to an ordinary enterprise, but is deeply rooted in theology, in particular in ecclesiology.

20. The Pope has primacy over the Church, as a consequence of his acceptance of legitimate election as Bishop of Rome by the College of Cardinals and his episcopal consecration. By virtue of his office, he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely. Cf. 1983 Code of Canon Law, cc. 331 and 332 §1.

21. In common language, often reference is made to the Vatican, while the correct terminology is the Holy See or the Apostolic See. The two terms are synonyms, but canon law prefers to use Apostolic See, while Holy

See is most used in international law. The term Apostolic See or Holy See refers, first of all, to the Roman Pontiff, but also to the Secretariat of State, the Council for Public Affairs of the Church, and other institutes of the Roman Curia. Cf. 1983 Code of Canon Law, c. 361. In other words, the term Apostolic See or Holy See refers to the Pope and to the institutions (of the Roman Curia) who assist him in exercising his Petrine ministry. These institutions of the Roman Curia are with a technical term called dicasteries. Currently, the constitution and competence of the various departments of the Roman Curia are governed by the aforementioned apostolic constitution *Pastor bonus*.

22. It is important to make the distinction between the Holy See or Apostolic See on the one hand and Vatican City State on the other. The Pope is not only the Bishop of Rome and therefore head of the College of Bishops in virtue of his primacy, he is also head of state of Vatican City State.

23. Particular Churches, in which and from which the one and only Catholic Church exists, are first of all dioceses, to which, unless it is otherwise evident, are likened a territorial prelature and territorial abbacy, an apostolic vicariate and an apostolic prefecture, and an apostolic administration erected in a stable manner. Cf. 1983 Code of Canon Law, c. 368.

24. A diocese is a portion of the people of God which is entrusted to a bishop for him to shepherd with the cooperation of his presbyterium, so that, adhering to its pastor and gathered by him in the Holy Spirit

through the gospel and the Eucharist, it constitutes a particular Church in which the one, holy, catholic, and apostolic Church of Christ is truly present. Cf. 1983 Code of Canon Law, c. 369.

25. Every diocese or other particular church is to be divided into distinct parts, called parishes (cf. 1983 Code of Canon Law, c. 374 §1). As a rule, dioceses or particular churches and parishes are limited to a certain territory and include therefore all the faithful living within that territory. Exceptionally, other criteria, such as rite of the faithful or being part of a particular group might encourage competent authority to erect a diocese or a particular church or a parish on another basis. An example of a particular Church based not upon territory but upon the people belonging to it is the Archdiocese for Military Services, USA: while, in theory, the Archdiocese is present everywhere in the world (at least where there are American military present), the jurisdiction of the Archbishop is based not on territory but on a personal qualification, namely belonging to the US military. For centuries or decades, most dioceses in the United States had (and some continue to have) what we call national parishes: these parishes are based not on a certain territory, but on the nationality of origin of those belonging to it.

26. The picture of the organization of the Church would not be complete without mentioning the institutes of consecrated life (religious institutes and secular institutes) and the societies of apostolic life. While these institutes and societies operate in dioceses and parishes, and while they are part of the Church, they

have what is called a just autonomy, and their internal life is governed by, on the one hand, the general norms on consecrated life of the 1983 Code of Canon Law, and on the other hand by their proper law. An important distinction in this regard is the distinction between institutes and societies of pontifical right and institutes and societies of diocesan right: the former have been erected or at least approved by the Apostolic See (in particular by the competent dicastery of the Roman Curia, namely the Congregation for the Institutes of Consecrated Life and the Societies of Apostolic Life, usually abbreviated as CICLSAL), while the latter have been erected by a diocesan bishop and have not obtained a decree of approval from the Apostolic See (cf. 1983 Code of Canon Law, c. 589). The distinction is important in light of the authority competent to exercise vigilance over those institutes and societies (diocesan Bishop versus Apostolic See) and is thus a matter of checks and balances. Institutes of consecrated life are public juridic persons by the law itself (1983 Code of Canon Law, c. 634).

27. Finally, within the life of the Church, there are numerous organizations connected with the Church and to some lesser or higher degree approved by the Church: these too belong to the organizational chart of the Church. These are associations of the faithful.

III. Physical Persons and Juridic Persons, and Associations in the Church

28. Canon law distinguishes, just like civil law, between physical persons (or human beings) on the one hand and juridic persons on the other. Within the category of juridic persons, the Catholic Church and the Apostolic See have the character of a moral person (1983 Code of Canon Law, c. 113 §1). First of all, moral persons and juridic persons are not the same under canon law: when we say that some entity is a moral person in canon law, this implies that the entity is free and exists by divine ordinance and has a legal capacity to act. In other words, no human intervention, and certainly no political intervention or recognition whatsoever, is needed to erect these entities as juridic persons. No human authority can prohibit the Church or the Pope to act and to fulfill their mission for and in the Church. Juridic persons, distinct from these moral persons, are constituted either by the law itself or by special grant of competent authority given through a decree (cf. 1983 Code of Canon Law, c. 114 §1).

29. Such juridic persons in the Church are either aggregates of persons (basically an association of some sort) or aggregates of things (something akin a foundation). Cf. 1983 Code of Canon Law, c. 115. The purposes of these juridic persons are understood as those which pertain to works of piety, of the apostolate, or of charity, whether spiritual or temporal (1983 Code of Canon Law, c. 114 §2).

30. A further distinction is to be made between public juridic persons and private juridic persons. Public juridic persons are constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfill in the name of the Church, according to the norm of the prescripts of the law, the proper function entrusted to them in view of the public good. Public juridic persons become a legal or juridic person either by the law itself or by a special decree of competent authority expressly granting this juridic personality. (cf. 1983 Code of Canon Law, c. 116). The norms governing each juridic person are found in universal and particular law, and, in addition, also in the statutes: each juridic person is supposed to have its own statutes (cf. 1983 Code of Canon Law, c. 117). These statutes will spell out in greater detail the organization and norms for the juridic person, unless that would already have been spelled out in universal or particular law. A parish, for instance, is a public juridic person by the law itself, and is, according to universal law (cf. 1983 Code of Canon Law, c. 515 §3) represented by its pastor. Religious institutes, provinces in a religious institute, and houses are also juridic persons by the law itself (cf. 1983 Code of Canon Law, c. 634 §1). Last but not least: a juridic person is, by its nature, perpetual. In other words, it is supposed to exist and not to be suppressed. However, a juridic person is extinguished if it is legitimately suppressed by competent authority or if it has ceased to act for a hundred years. A private juridic person is extinguished if the association is dissolved according to the norm of its statutes or if, in the judgment of competent authority,

the foundation has ceased to exist according to the norm of its statutes (cf. 1983 Code of Canon Law, c. 120 §1).

31. All temporal goods which belong to public juridic persons are considered to be ecclesiastical goods and therefore the norms of Book V of the 1983 Code of Canon Law apply to these temporal goods (1983 Code of Canon Law, c. 1257 §1). The legislator has emphasized that administrators of ecclesiastical goods are to take care that the ownership of ecclesiastical goods is protected by civilly valid means (1983 Code of Canon Law, c. 1284 §1, 2°) and that they observe the prescripts of both canon and civil law or those imposed by a founder, a donor, or legitimate authority, and especially be on guard so that no damage comes to the Church from the non-observance of civil laws (1983 Code of Canon Law, c. 1284 61, 3°). The temporal goods of religious institutes are ecclesiastical and are for that reason governed by Book V of the 1983 Code of Canon Law, as stated explicitly in c. 635 §1.

IV. The Franciscan Sisters of the Poor

32. From 1861 until 1973, the Franciscan Sisters of the Poor, formerly known as The Sisters of the Poor of St. Francis, Covington (the "Franciscan Sisters") operated and sponsored the St. Elizabeth Hospital in Covington. They were founded in Germany by Frances Schervier in 1845. The Constitutions of the Congregation were approved by Cardinal Johannes von Geissel, the Archbishop of Cologne, in 1851. The first 24

members of the Congregation received their habits and took their vows on the Feast of St. Claire, August 12, 1851. In 1865, revised and expanded Constitutions of this Congregation were approved. In 1870, the Congregation sought approval of the Apostolic See – to become, as explained above, a religious institute of pontifical right instead of a religious institute of diocesan right – and said approval was granted by the Holy See and granted definitively on October 12, 1901.

33. The Congregation flourished and the number of houses grew rapidly, in the United States and elsewhere. Because of the two World Wars, the difficulties reached a point where the Congregation founded by Mother Schervier was *de facto* divided in two parts, one European and one American, each with their local customs and its own superiors. A first request to divide the Congregation into two separate Congregations was made in 1952, but the Sacred Congregation for Religious in Rome, the department of the Roman Curia competent in this matter, decided to have the matter studied. On April 13, 1959, Pope St. John XXIII approved the separation of the Congregation of the Sisters of the Poor of Saint Francis into two autonomous religious Congregations, establishing each of these two Congregations as a juridical person of pontifical right. The decree of the Sacred Congregation for Religious stipulates that the Congregation of the Sisters of the Poor of Saint Francis is divided into two autonomous religious Congregations, the vernacular name of the one, with its generalate in Aachen, being "Arme Schwestern vom heiligen Franziskus", while that of

the other, whose generalate is in Frascati, is "Franciscan Sisters of the Poor". It was at that time further decided that the houses in Germany and Belgium would belong to the Congregation of Aachen, while the houses in the United States of America and in Italy would belong to the American Congregation. (Exhibit III: Decree of the Sacred Congregation of Religious, Prot. No. 2020/50). The same Sacred Congregation of Religious approved on July 28, 1964, the revised and adapted Constitutions of the Franciscan Sisters of the Poor. (Exhibit JJJ)

34. Today, the Poor Sisters of Saint Francis serve in Germany, Belgium, Denmark, and Siberia, while the Franciscan Sisters of the Poor serve in the United States, Brazil, Italy, Senegal, and the Philippines. The *Annuario Pontificio 2016* (Exhibit KKK), the who's who at the highest level of the hierarchy of the Catholic Church shows not only that the Franciscan Sisters of the Poor are recognized by the Holy See, but are also incorporated within that same Catholic Church and belong to it.

35. While institutes of consecrated life have their own autonomy, they are subject to ecclesiastical authority in those internal matters of governance and discipline which exceed the competence of legitimate authority within the institute. When an institute is of pontifical right, this ecclesiastical authority is the Holy See, and more in particular the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (current name of the competent department of the Roman Curia). Such is illustrated by the May 11, 1970

approval for a $2,000,000 loan to the Sisters to update their hospital facility and nursing school in Covington: the Sacred Congregation for Religious and Secular Institutes gave this approval after the Congregation received a positive recommendation from the Bishop of Covington. (Exhibit LLL) When it comes to works of the apostolate, religious are also subject to the power of the diocesan bishop, even if they are of pontifical right.

36. The Franciscan Sisters incorporated civilly on February 20, 1868, through an Act of the Kentucky General Assembly. The object of the incorporation was "to take care of the poor and the sick according to the vow of their order or society," which in turn constitutes a reference to their proper charism as spelled out in their constitutions. The Sisters made this concrete by founding and operating a hospital known as St. Elizabeth Hospital. In 1966, the St. Elizabeth pension plan was established by the Franciscan Sisters of the Poor. At that time, the Franciscan Sisters were already a religious institute of pontifical right and therefore subject to the oversight of the competent department of the Roman Curia, currently the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.

V. St. Elizabeth Medical Center, Inc.

37. St. Elizabeth Hospital was sponsored by the Franciscan Sisters of the Poor from its foundation in 1861 (with subsequent incorporation in 1868) until the

transfer of the sponsorship in 1973 to the Diocese of Covington. In 1973, the Sisters indicated that they wanted to be released from their sponsorship of the St. Elizabeth Hospital and requested the Diocese of Convington to take over said sponsorship. Correspondence about this operation is part of the exhibits in this case.

38. The transfer of sponsorship, from a canonical point of view, entails the transfer of control from the public juridic person that is the religious institute (the Franciscan Sisters of the Poor) to another public juridic person that is the Diocese of Covington. It explains the involvement of the then Congregation for Religious and Secular Institutes (in the exhibits called the *Congregatio pro Religiosis et Institutis Saecularibus*; since that time, its name has changed to the Congregation for the Institutes of Consecrated Life and Societies of Apostolic Life), the competent department of the Roman Curia that exercises vigilance over religious institutes and their apostolate.

39. The canonical literature has produced a number of definitions of sponsorship. One definition is in particular very helpful: "Sponsorship is a reservation of canonical control by the juridic person that founded and/or sustains an incorporated apostolate that remains canonically a part of the church entity. This retention of control need not be such as to create civil law liability on the part of the sponsor for corporate acts or omissions but should be enough for the canonical stewards of the sponsoring organization to meet their canonical obligations of faith and administration

regarding the activities of the incorporated apostolate." (Jordan Hite, *A Primer on Public and Private Juridic Persons: Applications to Catholic Healthcare Ministry* [St. Louis, MO: Catholic Health Association, 2000] 37.) A similar definition is given in the proceedings of a symposium on sponsorship: "Sponsorship of an apostolate or ministry is a formal relationship between a recognized Catholic organization and a legally formed entity, entered into for the same of promoting and sustaining the Church's mission in the world." (Rosemary Smith, SC, Warren Brown, OMI and Nancy Reynolds, SP, ed., *Sponsorship in the United States Context. Theory and Praxis* [Alexandria, VA: Canon Law Society of America, 2006] ii.) In the same publication, sponsorship is defined in yet another wording, but still with the same meaning: "Sponsorship is the legally protected authority in the corporation of the leadership of a public juridic person to control those elements of the corporation that correspond to the canonical order governing the relationship of a public juridic person to its apostolate." (Melanie DiPietro, S.C., "A Juridic Meaning of Sponsorship in the Formal Relationship between a Public Juridic Person and a Healtcare Corporation in the United States," in *Sponsorship in the United States Context. Theory and Praxis*, ed. Rosemary Smith, SC, Warren Brown, OMI and Nancy Reynolds, SP, [Alexandria, VA: Canon Law Society of America, 2006] 120).

VI. Conclusion

40. My expertise as a canon lawyer and my review of the declarations, with exhibits, of Garren Colvin, the CEO of St. Elizabeth Hospital, Most Reverend Roger J. Foys, Bishop of Covington, and Joseph G. Bozzelli, the Catholic Chaplain of St. Elizabeth, lead me to the following conclusions.

41. It is obvious that the Franciscan Sisters of the Poor who started St. Elizabeth Hospital in 1861 were not only recognized by the Church, but, because of the recognition as an institute of consecrated life, first by the Archbishop of Cologne and later by the Holy See, form an essential part of the Church and therefore constitute the Church.

42. St. Elizabeth Hospital, whose formal corporate name is St. Elizabeth Medical Center, Inc., was founded by the Franciscan Sisters of the Poor and has therefore not only been associated with the Church from the very beginning, but formed an essential part of the ministry of the Church. When the sponsorship of the hospital was transferred in 1973 from the Franciscan Sisters of the Poor to the Diocese of Covington, the association with the Church was not lessened, but on the contrary strengthened: St. Elizabeth Hospital has since that transfer been closer linked with the ecclesiastical hierarchy and falls under the direct control of the Bishop of Covington. A better association with the Church is not possible.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 6, 2016.

/s/ Kurt Martens
KURT MARTENS, J.C.D.
Professor of Canon Law
The Catholic University of America